FILE COPY

No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

CHARLES FAHY,
PHILIP LEVY,
WALTER B. WILBUR,
Attorneys for Petitioner.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	8
Argument	15
I. Sub-Group A-1 Plus Is Invalid	15
A. Sub-group A-1 Plus was established by the Commission in the belief it was required by The Selective Training and Service Act of 1940	15
B. Sub-group A-1 Plus is not required by the Selective Training and Service Act of 1940	18
C. Since the Commission erred in promulgating Sub-group A-1 Plus under a mistaken interpretation of law, that sub-group should be set aside	23
D. Sub-group A-1 Plus is beyond the scope of the Commission's authority under Section 12 of the Veterans' Preference Act of 1944	26
II. Sub-Group A-1 Is Invalid	30
A. Sub-group A-1 was established by the Commission in the belief it was required by Section 12 of the Veterans' Preference Act of 1944	30
B. Sub-group A-1 is neither required nor authorized by Section 12 of the Veterans' Preference Act of 1944	31
1. Analysis of the Act	31
Objectives	31
Meaning of "military preference" under Section 12	35
Relation of "military preference" to the other three factors in Section 12	38
Sub-group A-1 exceeded the Commission's discretion	47

Page

2. Legislative history of Section 12 50
Contemporaneous history 50
Previous background 57
Subsequent history 68
3. Harmful consequences of the Commission's regulations 73
4. Conclusion 79

III. Petitioner Should Be Granted Such Further Relief On Remand As This Court May Deem Just and Proper ... 79

Conclusion 80

Supplement

1. Veterans' Preference Act of 1944, as amended 81
2. Selective Training and Service Act of 1940, Sec. 8, as amended 88
3. Act of August 24, 1912, Sec. 6 89
4. United States Civil Service Commission, Retention Preference Regulations for Use in Reduction-in-Force 89

CASES:

Addison v. Holly Hill Fruit Products Inc., 322 U. S. 607 ..... 14, 28, 48, 79, 80
American Stevedores, Inc. v. Porello, 330 U. S. 446 ..... 53, 56, 57
Arenas v. United States, 322 U. S. 419 29
Breiner v. Wallin, Civil No. 7694 (E. D. Pa.) 64
Bruce's Juices v. American Can Co., 330 U. S. 743 73
Chicago & Southern Air Lines Inc. v. Waterman S. S. Co., decided Feb. 9, 1948, Nos. 78, 88, this Term 33
Clark v. Uebersee Finanz-Korporation, 332 U. S. 480 ..... 13, 68, 78
Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 54
Elder v. Anderson, Civil No. 2336-47 (D. C. D. C.) 65
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 ..... 8, 11, 16, 17, 19, 20, 21, 23, 25, 39, 70
Furman v. Anderson, Civil No. 2335-47 (D. C. D. C.) 66
Garrett Biblical Institute v. American University, 163 F. 2d 265 (App. D. C.) 29
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 78
Giblin v. Curtiss-Wright Corp., decided Feb. 6, 1947 (D. N. J.), 12 Labor Cases C. C. H. par. 63,792 21
Great Lakes Co. v. Huffman, 319 U. S. 293 71
Helvering v. Winmill, 305 U. S. 79 70
Hubickey v. Cohen, decided March 8, 1948, No. 131, this Term 22
Humphrey's Executor v. United States, 295 U. S. 602 19

Page

Cases:—Continued
Levinson v. Spector Motor Co., 330 U. S. 649 73
Louisville & Nashville Ry. Co. v. United States, 282 U. S. 740 71
Maloney v. Chicago, B.&Q. R.R., 72 F. Supp. 124 (W. D. Mo.) 20
Markham v. Cabell, 326 U. S. 404 ..... 12, 33, 48
McDonald v. Thompson, 305 U. S. 263 37
Mikczynski v. North American Aviation, Inc., decided April 22, 1947 (S. D. Cal.) 12 Labor Cases C. C. H. par. 63,814 20
Mitchell v. Cohen, decided March 8, 1948, No. 130, this Term 13, 18, 22, 31, 33, 61, 63
Order of Railway Conductors v. Pitney, 326 U. S. 561 80
Pacific Gas and Electric Co. v. Securities Exchange Commission, 127 F. 2d 378 (C. C. A. 9th), affirmed, 324 U. S. 826 56
Packard Motor Car Co. v. National Labor Relations Board, 330 U. S. 485 56
Pennsylvania R.R. v. International Coal Company, 230 U. S. 184 ..... 56, 57
Petition of Public National Bank of New York, 278 U. S. 101 39
Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177 28
Sartor v. Arkansas Gas Corp., 321 U. S. 620 29
Securities & Exchange Commission v. Chenery, 318 U. S. 80 ..... 8, 24, 28
Securities & Exchange Commission v. Chenery, 332 U. S. 194 ..... 8, 25
Siegel v. Federal Trade Commission, 327 U. S. 68 28
Trailmobile Company v. Whirls, 331 U. S. 40 ..... 8, 19, 20, 21, 37, 56
United States v. American Trucking Ass'ns., 310 U. S. 534 33
United States v. Carolina Carriers Corp., 315 U. S. 475 25
United States v. Dotterweich, 320 U. S. 277 33
United States v. Durkee Famous Foods, 306 U. S. 68 53
United States v. Kirby, 7 Wall. 482 79
United States v. Perkins, 116 U. S. 483 19
United States v. Rosenblum Truck Lines, 315 U. S. 50 78
United States v. Southeastern Underwriters Ass'n., 322 U. S. 533 71
United States v. Townsley, 323 U. S. 557 ..... 56, 71
United States v. United Mine Workers of America, 330 U. S. 258 71
United States v. Wickersham, 201 U. S. 390 19
Washington Market Co. v. Hoffman, 101 U. S. 112 39
Weisser v. Mursam Shoe Corp., 127 F. 2d 344 (C. C. A. 2d) 29
Wettre v. Hague, 74 F. Supp. 396 (D. Mass.) 67

STATUTES: Page

Act of August 15, 1876, 19 Stat. 169 37
Act of August 23, 1912, Sec. 4, 37 Stat. 413 ..... 13, 37, 55, 62, 63, 64, 65
Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. Sec. 6 ..... 2, 20
Act of February 28, 1916, 39 Stat. 15 67
Act of July 11, 1919, 41 Stat. 37 37
Act of June 18, 1929, 46 Stat. 21, 26 37
Act of March 3, 1933, 47 Stat. 1519, Sec. 17 67
Act of August 8, 1946, 60 Stat. 939 ..... 68, 70
Act of February 28, 1948, Public Law 426, Sec. 1 70
Selective Training and Service Act of 1940, 54 Stat. 890 ..... 6, 18
See. 8 ..... 2, 8, 15, 17, 20, 22, 23, 26, 29
Servicemen's Readjustment Act, 58 Stat. 284, 38 U. S. C. Sec. 693 32
Veterans' Preference Act of 1944, 58 Stat. 390:
Sec. 2 36
Sec. 3 ..... 11, 36, 37, 41, 42
Sec. 7 ..... 11, 36, 42
Sec. 12 ..... 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 23, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 40, 41, 42, 49, 51, 52, 53, 55, 56, 58, 62, 64, 66, 70, 71, 79, 80
See. 18 ..... 12, 18, 61, 62, 63, 65

MISCELLANEOUS:

Annual Report of the Secretary of the Navy (1946) 74
Biennial Report of the Chief of Staff of the United States Army to the Secretary of War, July 1, 1941 to June 30, 1943 76
Biennial Report of the Chief of Staff of the United States Army to the Secretary of War, July 1, 1943 to June 30, 1945 76
Code of Federal Regulations (1945 Supp.) § 12.309(a) 80
48 Congressional Record 6191 67
90 Congressional Record 1233, 2401, 3156, 3501-3507, 4959, 5785, 6283, 6712 50
90 Congressional Record 3503, 3505 57
92 Congressional Record 9016, 9017, 9018 ..... 69, 70
93 Congressional Record 9754 (July 21, 1947, daily ed.) 73
93 Congressional Record 10008 (July 23, 1947, daily ed.) 60
94 Congressional Record 3013-3014 (March 16, 1948, daily ed.) 20
Corson, Manpower for Victory (1943) 76
Executive Order 9309, Part V (March 6, 1943) 78
12 F. R. 1391 35
12 F. R. 1283 44
12 F. R. 59 23

MISCELLANEOUS:—Continued

	Page
10 F. R. 12181	35
9 F. R. 13700	35
5 F. R. 4447	44
H. Doc. 361, *Post-War Benefits to Veterans of the Armed Forces*, 78th Cong. 1st Sess. (1943)	32
H. Doc. 344, *Post-War Educational Opportunities for Service Personnel*, 78th Cong. 1st Sess.	32
H. Doc. 456, 80th Cong. 2d Sess.	32
H. Doc. 910, 62d Cong. 2d Sess.	67
H. R. 739, 80th Cong. 1st Sess.	71
H. R. 882, 78th Cong. 1st Sess. Sec. 12	51, 54
H. R. 4115, 78th Cong. 2d Sess.	50, 54
H. R. 5821, 75th Cong.	50
H. R. 5979, 79th Cong. 2d Sess.	71
H. R. 6497, 75th Cong.	50
H. R. 24023, 62d Cong. 2d Sess.	67
H. Rep. No. 633, 62d Cong. 2d Sess.	67
H. Rep. No. 1289, 78th Cong. 2d Sess.	34, 53, 58, 61, 66
H. Rep. No. 1436, 80th Cong. 2d Sess.	20
H. Rep. No. 2443, 79th Cong. 2d Sess.	70
Hearings on H. R. 4718, Committee on the Civil Service, House of Representatives, 79th Cong. 2d Sess.	69, 70, 71
Hearings on S. 1762 and H. R. 4115, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess.	42, 50, 55, 60, 61, 63
National Resources Board, *Demobilization and Readjustment* (1943)	32
40 Opinion of Attorney General, No. 66 (May 23, 1943)	15
40 Opinion of Attorney General, No. 115 (Sept. 20, 1946)	17, 21
Report by the Supreme Allied Commander Mediterranean to the Combined Chiefs of Staff on the Operations in Southern France, August 1944	76
Report by the Supreme Commander to the Combined Chiefs of Staff on the Operations in Europe of the Allied Expeditionary Force, 6 June 1944 to 8 May 1945	76
Reports to the Secretary of the Navy by Fleet Admiral King in *U. S. Navy at War* 1941-1945 (1946)	76
S. 1486, 80th Cong. 2d Sess.	20
S. 1762, 78th Cong. 2d Sess.	50
S. Rep. No. 10, pt. 8, *Special Committee Investigating the National Defense Program, Additional Report on Shipbuilding and Shipping*, 78th Cong. 1st Sess.	76
S. Rep. No. 10, pt. 16, *Special Committee Investigating the National Defense Program, Third Annual Report*, 78th Cong. 2d Sess.	76
S. Rep. No. 10, pt. 18, *Additional Report on Merchant Shipping*, 78th Cong. 2d Sess.	76

MISCELLANEOUS:—Continued Page

S. Rep. No. 428, 80th Cong. 1st Sess. 60
S. Rep. No. 832, 62d Cong. 2d Sess. 67
S. Rep. No. 907, 78th Cong. 2d Sess. 56, 58, 61
Selective Service in Wartime (1943) 77
Selective Service System, *Local Board Memoranda*, 1941-1945 (1945):
Memorandum No. 115, March 16, 1942 77
Memorandum No. 115F, amended May 18, 1944 77
U. S. Civil Service Commission:
62nd Annual Report (1945) p. 20 16
62nd Annual Report (1945) p. 43 61
62nd Annual Report (1945) p. 57 68
Departmental Circulars:
No. 323 (Feb. 28, 1942) 44
No. 438, Sec. 2.113 (Oct. 22, 1943) 12 F. R. 1283 44
No. 510, Sec. 2 (Nov. 15, 1944) 9 F. R. 13700 35
No. 556, June 18, 1946 16
No. 556, Supp. No. 2 (Nov. 1, 1946) 18
Federal Personnel Manual (1945 ed.)
c. A3-1 16
c. R6-2 16
Letter to Hon. Joe Starnes, Jan. 31, 1944, Press Release, Feb. 2, 1944 52
Questions and Answers on New Reduction-in-Force Regulations (Aug. 8, 1944) 35
Reduction-in-Force Regulations:
§ 12.302(c), 10 F. R. 12181 (Sept. 27, 1945) 35
§ 20.2 45
§ 20.2(a) 20
§ 20.2(c), 12 F. R. 1391 (Feb. 25, 1947) 4, 35
§ 20.2(h) 45
§ 20.2(i) 45
§ 20.2(j) 45
§ 20.3 ..... 4, 44, 65
§ 20.7 ..... 4, 45
§ 20.8 5
§ 20.9(a), 12 F. R. 59 (Jan. 4, 1947) 23
§ 20.10, 12 F. R. 59 (Jan. 4, 1947) 23
Rule VII 2(c) 44

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BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51-52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 53-56) is reported at 165 F. 2d 251.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The petition for a writ of certiorari was filed on January 30, 1948, and was granted on March 8, 1948. The jurisdiction of this Court rests

upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the "superseniority" for one year after return from military service granted veterans of World War II with civil service tenure in Government employment, in preference to all other employees regardless of efficiency or length of service (Sub-group A-1 Plus), is required or authorized by Section 8 of the Selective Training and Service Act of 1940.

2. Whether the civil service regulations for reductions-in-force in Government employment, granting veterans "superseniority" for one year (Sub-group A-1 Plus), and certain preferential standing thereafter regardless of length of service (Sub-group A-1), may be upheld as valid exercises of discretion under Section 12 of the Veterans' Preference Act of 1944 notwithstanding that they were established by the Civil Service Commission in the mistaken belief they were required by law.

3. Whether the civil service regulations for reductions-in-force in Government employment, granting veterans "superseniority" for one year (Sub-group A-1 Plus), and certain preferential standing thereafter regardless of length of service (Sub-group A-1), are required or authorized by Section 12 of the Veterans' Preference Act of 1944.

STATUTES AND REGULATIONS INVOLVED

The Veterans' Preference Act of 1944, 58 Stat. 387 as amended, Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890 as amended, Section 6 of the Act of August 24, 1912, 37 Stat. 555, and the perti-

nent portions of the reduction-in-force regulations, as amended, issued under Section 12 of the Veterans' Preference Act of 1944, are set forth in the Supplement, *infra* pp. 81-95. The regulations are hereinafter cited by § symbol.

STATEMENT

Petitioner was employed in the United States Navy Yard at Charleston, South Carolina, with permanent status in the classified civil service (R. 3). On January 7, 1946, he was demoted from his position of Shipfitter Leadingman at $12.08 per diem, to Shipfitter Maximum at $10.08 per diem (R. 10), and on November 8, 1946 was furloughed without pay for a period of one year in consequence of reductions of personnel in the Navy Yard carried out in accordance with regulations of the United States Civil Service Commission (R. 22). Petitioner had rendered more than twelve years of service as a skilled workman in the shipfitters shop at this Yard, and had an efficiency rating of "Excellent" (R. 4, 10). He was classified over-age for military service (R. 10),[1] he did not serve in the armed forces, and consequently was not entitled to veterans' preference.

The Commission's retention preference regulations for use in reductions-in-force (*infra* pp. 89-95) provide that employees in each grade or "competitive level" in each agency or installation shall first be divided into three "retention groups" based upon the nature of their tenure of employment, as follows:

> Group A, employees who have met all requirements for indefinite retention in present positions;

[1] Petitioner's correct draft classification was IV-A, not IV-E as the record inadvertently shows (R. 10).

Group B, employees serving under appointments with a time limitation exceeding one year;

Group C, employees serving under temporary appointments with time limitations of one year or less. § 20.3.

Each such group is then divided into sub-groups according to veterans' preference and—except for sub-group A-1 Plus—efficiency rating. Group A is accordingly subdivided as follows:

"A-1 Plus during one-year period after return to duty, as required by law.

A-1 With veteran preference unless efficiency rating is less than 'Good'.

A-2 Without veteran preference unless efficiency rating is less than 'Good'.

A-3 With veteran preference where efficiency rating is less than 'Good'.

A-4 Without veteran preference where efficiency rating is less than 'Good'." *Id.*

Groups B and C are likewise broken down in four similarly numbered subdivisions, omitting the "1 Plus" category in each instance. *Id.* Within each of these sub-groups employees are assigned retention credits by allowing one point for each full year of Government service (including military service), five points for an "excellent" efficiency rating, three points for a "very good" efficiency rating, and one point for a "good" efficiency rating. § 20.2(c).[2] Employees are listed in their respective sub-groups in order of their total number of retention points. § 20.7. Reductions-in-force are made by starting with the lowest sub-group, that is, Sub-

[2] The point scores given efficiency ratings under the regulations at various times are set forth *infra*, p. 35, note 11.

group C-4, and eliminating employees in inverse order of the number of their retention credits. All employees in a lower sub-group must be eliminated before those in the next higher sub-group are reached. § 20.8.

Petitioner was placed in Group A, Sub-group A-2 on the retention registers (R. 21, 30). At the time of petitioner's furlough the regulations gave higher retention priority on the shipfitter register to 57 employees in Sub-group A-1 (R. 28-29) and 118 employees in Sub-group A-1 Plus (R. 25-28). Of those in Sub-group A-1 Plus, 2 were listed with efficiency ratings of "excellent" (R. 25), 55 were rated "good" (R. 25-27), and 61 were listed "no efficiency" (R. 27-28). Non-veterans with ratings of "no efficiency" were placed below Sub-group A-2 on the register, and therefore furloughed before petitioner was reached (R. 32).

Petitioner brought this action in the United States District Court for the District of Columbia, for a declaratory judgment that the regulations as applied to him were beyond the scope of respondents' authority, and for other relief (R. 2). After answer (R. 6), both petitioner and respondents moved for summary judgment on the ground that no genuine issue as to any material fact was presented and that judgment be given as a matter of law (R. 9, 51). The District Court denied the motion by the petitioner, and granted summary judgment for the respondents (R. 52), based on a memorandum opinion that the regulations complained of were consistent with the purpose, letter and spirit of the Veterans' Preference Act of 1944 (R. 51-52). Final order was entered May 9, 1947 (R. 52). On appeal the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 57). Its opinion declared that the Commission's regu-

lations were not "the only possible method" of applying the Act as the Commission had contended (R. 55); that the statute "did not mean to foreclose the Commission by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced Federal force in preference to experienced non-veteran personnel" (R. 56). The court stopped short, however, of holding the regulations void, declaring it could not say that they were "an unreasonable method" of applying the statute (R. 55).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that Sub-groups A-1 Plus and A-1 of the regulations for reduction-in-force of Federal Government employees as here applied were within the discretion of the Civil Service Commission, and in affirming the judgment of the District Court upon that ground, notwithstanding that respondents established those sub-groups in the mistaken belief they were required by law.

2. In failing to hold that Sub-groups A-1 Plus and A-1 of the reduction-in-force regulations as here applied were not required by either the Selective Training and Service Act of 1940 or the Veterans' Preference Act of 1944, and in failing to invalidate those sub-groups on the ground they had been established by the Civil Service Commission in the mistaken belief they were respectively required by those laws.

3. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group

A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans were retained in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of efficiency ratings or seniority.

4. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby veterans with ratings of "no efficiency" were retained as shipfitters in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of their higher efficiency ratings and greater seniority.

5. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group A-1 of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans with efficiency ratings of "good" or better were retained in the Charleston Navy Yard in preference to petitioner and other shipfitters in that Navy Yard who are non-veterans but had higher efficiency ratings and greater seniority.

6. In affirming the judgment of the District Court denying petitioner's and granting respondents' motion for summary judgment.

7. In failing to reverse the judgment of the District Court, with direction for appropriate relief based on the invalidity of the regulations as here applied.

SUMMARY OF ARGUMENT

I. Sub-group A-1 Plus of the Commission's regulations, granting "superseniority" to veterans of World War II for one year regardless of efficiency or length of service, is invalid. The Commission established this sub-group in the belief that it was "required by law", namely by Section 8 of the Selective Training and Service Act of 1940. This Court has rejected the contention that the Act of 1940 granted such "superseniority" to veterans in either public or private employment where, as here, a *bona fide* reduction-in-force becomes necessary at some time during the first year of return from military service. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-291; *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 56-57. The attempted distinction between this and the *Fishgold* case, based on the length of furlough, is contrary to the meaning of the terms "discharge" and "furlough" in the Act of 1940 and in the very record and regulations here involved. Since the Commission erred in promulgating Sub-group A-1 Plus under a mistaken interpretation of law, the administrative action should be set aside. The grounds upon which the Commission acted in exercising its powers were not those upon which its action can be sustained. *Securities Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95, 332 U. S. 194, 196-197.

In any event Sub-group A-1 Plus is neither required nor authorized by Section 12 of the Veterans' Preference Act of 1944. The sub-group completely ignores the requirements of that section that "due effect" be given length of service and efficiency. The Commission particularly erred in placing in Sub-group A-1 Plus 61 veterans with ratings of "no efficiency". With the sub-group held invalid under Section 12, we can-

not assume that the regulations in all other respects would be retained as written, for this Court will not take on itself discretionary authority vested in the first instance in the Commission. Moreover, even under respondents' regulations, Sub-group A-1, the 61 veterans with "no efficiency" lacked the rating of "good" or better needed to displace non-veterans like petitioner with "excellent" ratings. On this petition to review the granting of summary judgment below, there is no factual basis for assuming that all these veterans with "no efficiency" rating would eventually have received a rating of "good" or better, or that any of them had attained such rating before induction.

II. Sub-group A-1, granting absolute preference to veterans with ratings of "good" or better over all non-veterans with equivalent tenure of employment but regardless of length of service, is invalid. This sub-group was established by the Commission in the belief it was required by Section 12 of the Veterans' Preference Act of 1944. Respondents cannot now forestall the corrective powers of this Court by verbally shifting the basis of the regulation from compulsion to discretion. Here, as in Sub-group A-1 Plus, the judgment below should be reversed if the agency has misconceived the law rather than exercised its discretion in an area entrusted to it by Congress.

Analysis of the Act, its objectives and legislative history, demonstrates that Sub-group A-1 is neither required nor authorized by Section 12. The Act is part of a comprehensive post-war program developed by the Federal Government for the reemployment and rehabilitation of veterans of World War II, all designed to reestablish them as citizens in a healthy national economy. The meaning of Section 12 and the validity of

Sub-group A-1 thereunder must be ascertained in the light of that objective. Section 12 requires that regulations for reduction in force "shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings". "Military preference" is the only one of the four factors which is not self-defining. Its meaning is not fixed, but varies throughout the statute depending upon the particular employment problem. The content of the preference under Section 12 has the weight given in the first two provisos thereof, and nothing more. The first proviso requires that time spent in the armed forces be counted toward length of total service. The second proviso, which deals solely with the factor of efficiency, requires that the veteran with an efficiency rating of "good" or better shall be preferred over "all other competing employees", and if his efficiency rating is below "good" he shall be preferred over "competing non-preference employees" with the same or lower efficiency ratings. The factors of efficiency and length of service are thus augmented by the veteran's preference, but the veteran's retention standing as augmented must nevertheless be compared with that of non-veterans in the final determination on reductions in force. Whatever method or order of grouping is adopted, the veteran with a rating of "good" is preferred over the non-veteran having the same tenure and aggregate length of service, in keeping with the second proviso. The Commission retains discretion, of course, to determine what periods of service shall be considered of equal weight in such grouping. In this way, we "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions per-

mits". *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285. The veteran is thus given special consideration in reestablishing himself in Government service, but without committing the error of setting him above and apart from the national interest by a form of "super-seniority."

The fundamental error in the Commission's regulations is the failure to give due effect to length of service in the basic ranking or grouping of veterans *vis-a-vis* non-veterans, with the result that Sub-group A-1 erroneously gives absolute preference to veterans in reductions-in-force. In establishing Group A and Sub-group A-1 thereof, the Commission gives no weight whatever to length of service. It relegates that factor to a third-rate item used merely to distinguish between employees already grouped without regard to seniority. Where Congress intended such absolute veteran's preference under the Act, it used plain words manifesting that intention; for example, on entrance into Government employment by certain "preference eligibles" under Sections 3 and 7. There is no such legislative direction that absolute preference be given "preference employees" under Section 12, and the third proviso plainly negatives such a construction. The Commission recognizes by its regulations that the preference granted the veteran under the second proviso does not require it to disregard tenure of employment. By the same token, the Commission may not construe that proviso to disregard length of service in the original grouping, unless that conclusion is assumed in advance by an unwarranted construction of the phrase "all other competing employees". The process of interpretation misses its high function if a strict reading of the law "results in the emasculation or deletion of a provision which a less

literal reading would preserve". *Markham* v. *Cabell*, 326 U. S. 404, 409.

Sub-group A-1 is therefore neither required by the statute nor justified by any reasonable test of statutory discretion. This conclusion is supported by the immediate legislative background of the statute, the legislation and administrative practices preceding enactment, and the status of the measure in Congress subsequent to enactment. The Veterans' Preference Act was the outcome of eight years of Congressional consideration. The version introduced as late as 1943 by the House sponsor gave sole weight to length of service (including years of military service) in reductions-in-force. This was amended to conform to the present language, on the Commission's representation that consideration should also be given to the relative efficiency of the employees. The legislative history confirms that length of service was nevertheless to be given due effect, subject to the further proviso that years in military service shall be counted toward seniority in civil service.

Unquestionably one purpose of the Act of 1944 was to codify all the preference rights and privileges of veterans in Federal service. But the legislative history shows overwhelmingly that Congress made significant changes from the pre-existing practices and statutes relied upon by respondents in the construction of Section 12. Section 18 specifically provides that "all Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith." The purpose of the further saving clause in that Section is to protect the preference of peace-time veterans who were in Government employment and on civil service registers when the Act was passed, and who otherwise would be excluded by its terms. *Mitchell* v. *Cohen*, Nos. 130-

131, this Term. The changes from previous laws made by the Act of 1944 are nowhere more pronounced than in reference to Section 4 of the Act of August 23, 1912, which is cited by the Government as the earlier prototype of the second proviso of Section 12. In other litigation in the Federal courts, the Government is insisting that the Act of 1944 superseded the Act of 1912 and differs from it in many material respects. There are obvious differences in the language and context of the two statutes which reflect clear differences in their objectives and meaning. *Cf. Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 488-489.

Proceedings in Congress since the enactment of the Veterans' Preference Act show, if anything, that Congress does not concur in a construction or amendment of the Act giving absolute preference to veterans in disregard of the efficiency and seniority standing of career non-veteran employees. The historical background of the Act as a whole thus verifies petitioner's analysis that length of service is one of the important factors to be weighed in the basic grouping of employees for retention, and that the Commission's failure to accord such weight to length of service brings Sub-group A-1 into conflict with the statute.

Sub-group A-1 leads to unjust and unreasonable results that should be avoided in ascertaining the Congressional purpose. Approximately 85% of the veterans accorded absolute preference in the Charleston Navy Yard were without prior experience in shipbuilding and were trained by the career civil service employees whom they have displaced under the regulations. To a large extent, the efficiency of the naval shipyards and their capacity to meet the demands of World War II depended upon the well-developed skills of

these career employees. Many years will be required to bring the yards up to the previous level of ingenuity and skill.

American experience during World War II showed that manpower shortages were our greatest single problem in war procurement. Draft deferment policies were designed to retain personnel in the shipyards and other vital war production centers in direct order of usefulness for the civilian job to be done in aid of the armed forces afloat or in the field. Yet under the Commission's regulations, veterans with only a few weeks or months of Government service prior to induction are displacing the most seasoned and efficient career civil service employees. This action is harmful to the national defense and the civil service. It is contrary to the objectives of the statute and the veterans' reemployment and rehabilitation program of which it is an integral part.

In sum, Sub-group A-1 is based on a misapprehension of the meaning of "military preference" in Section 12, and contravenes the statutory plan to give appropriate weight to efficiency, seniority and tenure in relation to military service.

III. Petitioner should be granted such further relief on remand as this Court may deem just and proper, or which is not inconsistent with the opinion of this Court. Such relief requires "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially". *Addison* v. *Holly Hill Fruit Products Inc.*, 322 U. S. 607, 620-623.

ARGUMENT

I

SUB-GROUP A-1 PLUS IS INVALID

A. *Sub-group A-1 Plus Was Established by the Commission in the Belief It Was Required by the Selective Training and Service Act of 1940.*

Sub-group A-1 Plus of the Commission's reduction-in-force regulations grants the maximum priority, or "super-seniority", to World War II veterans, in preference to other veterans as well as to all non-veterans, "during one-year period after return to duty, as required by law". Notwithstanding the regulation itself states that the sub-group is "required by law", respondents argue that the issue thereunder is one of discretion involving "primarily" the Veterans' Preference Act of 1944 (Br. Opp. p. 16). It seems plain enough that the Commission established Sub-group A-1 Plus in the belief that it was "required by law"; and that the law referred to is Section 8 of the Selective Training and Service Act of 1940, as amended and supplemented, rather than the Veterans' Preference Act of 1944.

Thus the regulations contain no Sub-groups B-1 Plus or C-1 Plus, since the war service employees embraced by those sub-groups are deemed holders of "temporary positions" at time of induction and hence are expressly denied statutory restoration to their former positions under the language of Section 8 of the Selective Training and Service Act of 1940, *infra* p. 88, regardless of its scope as applied to veterans with permanent tenure. See 40 Op. Atty. Gen. No. 66, May 23, 1943.

This conclusion, evident on the face of the regulations, is confirmed by other pronouncements of the Commission in this regard. The Federal Personnel

Manual, publication of which began in 1945 as the Commission's "official medium" for issuing regulations (c. A3-1), in a chapter entitled "Restoration or Reemployment after Military Service" described the "legal basis" of such restoration as follows:

> "Restoration, statutory.—Reemployment in accordance with rights and benefits granted by the Selective Training and Service Act of 1940, as amended, the act of August 27, 1940, the Service Extension Act of 1941, or the Public Health Service Act of July 1, 1944. Such rights and benefits are limited to persons who leave other than 'temporary' positions . . .
>
> "Restoration, regulatory.—Reemployment in accordance with rights and benefits granted by section 10.109 of the Commission's regulations, section 2 of the War Service regulation XIII or section 2 of Temporary Civil Service regulation XVII, but not by statute. These restoration rights apply to persons appointed under the civil service rules or war service regulations whose appointments are not limited to one year or less but are 'temporary' within the meaning of the statutes referred to in the preceding paragraph. War-service indefinite appointees fall within this category". (Chapter R6-2)

See also *62nd Annual Report of the United States Civil Service Commission* (for the fiscal year ending June 30, 1945) p. 20.

The Commission consistently maintained this position when, in 1946, following the decision of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, it asked the Attorney General for an opinion as to the validity of sub-group A-1 Plus in reductions-in-force. *Departmental Circular No. 556*, June 18, 1946. The specific question propounded was as follows:

"Is the Federal Government obligated to reemploy a returning World War II veteran under section 8 of the Selective Training and Service Act, even though such reemployment would require the release of another veteran preference employee having greater length of service?"

The Opinion of the Attorney General states:

"... the instant question involves a determination of the validity of the regulations of the Civil Service Commission establishing the 'A-1 plus' category in reductions in force [5 C. F. R. (1945 Supp.) sec. 12.301]. *The Commission informs me that at the time the A-1 Plus category was established, that action was regarded as required by the provisions of section 8.* The Commission refers particularly to the provision of section 8 which prohibits the discharge of a reemployed veteran without cause for one year after his reemployment". 40 Op. Atty. Gen. No. 115 (Sept. 20, 1946) p. 4. (Italics supplied)

The Attorney General answered in the affirmative the question propounded, holding that Sub-group A-1 Plus was "valid and designed to effectuate the provisions of Section 8" of the Selective Training and Service Act. *Id.*, p. 5. The Commission thereupon advised all agencies and departments that the regulation would stand unchanged.[3]

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[3] "1. The attention of all departments and agencies is invited to the opinion of the Attorney General dated September 20, 1946, relative to the effect of the decision of the Supreme Court in the case of *Fishgold* v. *Sullivan Drydock & Repair Corporation, et al.*, on the Commission's retention-preference regulations.

"2. The Attorney General is of the opinion that 'the regulations of the Civil Service Commission establishing the A-1 plus retention preference are, • • • valid and designed to effectuate the

The Commission thus predicated and the Attorney General sanctioned sub-group A-1 Plus upon their construction of the requirements of the Selective Training and Service Act of 1940, as amended and supplemented, rather than upon any supposed discretionary authority stemming from the Veterans' Preference Act of 1944,[4] as the Government now appears to argue.

B. *Sub-group A-1 Plus Is Not Required by the Selective Training and Service Act of 1940.*

Applicable decisions of this Court have rejected the contention that Section 8 of the Selective Training and Service Act of 1940 grants the veteran any extraordinary retention priority or "super-seniority" when a *bona fide* reduction in force becomes necessary at some time during the first year following his return to

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provisions of section 8 (of the Selective Training and Service Act of 1940).

"3. In view of this opinion, the Commission does not propose to make any change in the retention-preference regulations as a result of the decision of the Supreme Court." *Departmental Circular No. 55o, Supplement No. 2,* November 1, 1946.

[4] The Attorney General's Opinion referred to also contends that the saving clause of Section 18 of the Veterans' Preference Act of 1944, namely that nothing therein "shall be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law", etc., indicates a Congressional "desire" for preservation of the veteran's "right" of restoration to his position (p. 8). Of course the Act of 1944 cannot save or preserve a "right" which, as will be demonstrated *infra,* pp. 19-29, the veteran actually did not enjoy. *Mitchell* v. *Cohen,* decided March 8, 1948, No. 130-131, this Term. Moreover the saving clause of Section 18 is designed simply to preserve the pre-existing rights of "peacetime" soldiers who are not covered by the Act of 1944. *Id.;* see *infra,* pp. 61-62.

duty after honorable discharge from military service. While that Act is to be liberally construed for the veteran's benefit, it did not intend to grant a step-up or gain in priority over what the veteran would have had if he had never entered the armed forces. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-289. As Judge Learned Hand pointed out in the opinion of the Circuit Court of Appeals in that case, Congress never sanctioned the regulation of the Director of Selective Service which in effect gave "industrial priority, regardless of their length of employment, to unmarried men—in the most part under 30—over men in the 30's, 40's or 50's who had wives and children dependent upon them". 154 F. 2d 785, 789 (C. C. A. 2d).

In the subsequent opinion in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, the contention for "'superseniority" within the statutory period was deemed on a par with that for statutory protection beyond one year. The Court did not believe that "Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit". 331 U. S. at 57.

The principles of these cases, like Section 8 of the Act they construed, are thus equally applicable whether the employment is public or private. *Id.* The Executive's power of removal from Federal office or employment, though broad, may be limited by statute in proper cases. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *United States* v. *Perkins*, 116 U. S. 483, 485; *United States* v. *Wickersham*, 201 U. S. 390. The principle is established by statute that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will pro-

mote the efficiency of said service". Act of August 24, 1912, Sec. 6, 37 Stat. 555. This provision has just been reiterated by Congress, limited only by the necessities of national security. S. 1486, 80th Cong. 2d Sess., sent to conference, March 16, 1948. 94 Cong. Rec. 3013-3014 (daily ed.); see H. Rep. No. 1436, 80th Cong., 2d Sess., pp. 3-6. Insofar as this principle is modified in making reductions-in-force, under the Selective Training and Service Act of 1940 or the Veterans' Preference Act of 1944, the appointing power in the executive branch of the Government must remain within the procedures and limitations there prescribed, as respondents appear to concede (Br. Opp. p. 7, note 2). For purposes of the instant case, petitioner's superior retention rights by operation of such laws have the same effect as the non-veterans' superior seniority rights under private contracts in the *Fishgold* and *Trailmobile* cases. See *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 53, note 21.

It is submitted that the *Fishgold* case affords no basis for respondents' argument below that the principle established should be limited to very brief layoffs comparable to the 1 to 9 day periods there involved; or in any event should be limited to furloughs not exceeding 30 days, which is the minimum for operation of the Commission's reduction-in-force regulations. §20.2(a). Respondents' position finds no support in the decisions under the Selective Training and Service Act since the *Fishgold* case, either by this Court in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, or by the lower Federal courts. See e.g., *Mikczynski* v. *North American Aviation, Inc.*, decided April 22, 1947 (S. D. Cal.) 12 Labor Cases C. C. H. ¶ 63,814; *Maloney* v. *Chicago B&Q R. R.*, 72 F. Supp. 124, 126 (W. D. Mo.);

Giblin v. *Curtiss-Wright Corp.*, decided February 6, 1947 (D. N. J.), 12 Labor Cases C. C. H. ¶ 63,792.

The Opinion of the Attorney General already referred to (*supra*, p. 17), assumes that "underlying the reduction in force regulations is a determination by the Civil Service Commission that 'separation' or 'furlough for over thirty days' are actions constituting a 'discharge' ". 40 Op. Atty. Gen. No. 115, p. 7. Even under this assumption, there is nothing of record to show that when petitioner was improperly furloughed in place of a veteran in Sub-group A-1 Plus, the latter had more than 30 days remaining in his statutory year. In any case, the Attorney General's assumption is contrary to the clear distinction recognized by this Court in the *Fishgold* case, between being placed on "furlough status" for one year and being "discharged" or separated in a reduction-in-force.[5] And in *Trailmobile* v. *Whirls*, this Court reiterated that the job guaranty for the statutory period did not apply to a veteran who "simply had been deprived of the opportunity to work by operation of the seniority system, when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his

[5] "Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been 'discharged'. • • • A furlough is not considered a discharge. It is a form of lay-off. • • • If [Congress] had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration, when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation". 328 U.S. 275, 286-287.

full standing under the Act". 331 U. S. at 56. This construction embraces any type of furlough in reductions-in-force, whether very brief or more extended, and eliminates any possible contention that a veteran who is furloughed for more than 30 days due to reduction-in-force has been "discharged from such position without cause" within the meaning of Section 8(c) of the Selective Training and Service Act of 1940.

The regulations as applied herein show conclusively that a furlough up to one year is not regarded as a discharge or separation. The notice of the Navy Department to petitioner states that "in view of the expressed policy of the Navy Department to retain its long-time high-grade career employees and in the hope that within one year conditions may justify your recall to duty, it is proposed to place you in a furlough status rather than effect your absolute separation by reduction in force . . . If you are in sub-group A-1 or A-2 you will be carried in a furlough status for a period of one year from the effective date of your furlough, unless sooner recalled to duty. At the end of the one year period you will be separated for reduction in force" (R. 22, 23-24)[6] "In the event you desire to be separated rather than furloughed, you should so advise the Industrial Relations Officer in writing" (R. 22-23). The Navy Department called attention to the fact that men placed on furlough are unable to secure a refund of their retirement deductions "until such time as your furlough is terminated by an absolute separation" (R. 23). This one-year notice was given pursuant to the retention

[6] In contrast, petitioners in *Mitchell* v. *Cohen* and *Hubickey* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term, were "separated" in reductions-in-force by the War and Navy Departments, respectively. *Id.*, Record on Writ of Certiorari, pp. 2, 55.

preference regulations of the Commission then in force, providing that employees may be furloughed for a period not exceeding one year instead of being separated outright when the reduction-in-force is the result of a temporary condition not expected to continue for more than one year. 5 C. F. R. (1945 Supp.) § 12.309(a). In event of vacancies, such furloughed employees "shall be given opportunity to return to duty before any original appointments are made to such positions". *Id.*[7]

The attempted distinction between this and the *Fishgold* case, based on the length of furlough, is thus seen to be contrary to the meaning of the term "discharge" in Section 8 of the Selective Training and Service Act of 1940 and in the very record and regulations here involved.

C. *Since the Commission Erred in Promulgating Sub-group A-1 Plus Under a Mistaken Interpretation of Law, that Sub-group Should Be Set Aside.*

While reiterating the position maintained since the regulations were established, that Sub-group A-1 Plus was required by law, respondents now contend that the sub-group is presently in force because the Commission "'so desires" under Section 12 of the Veterans' Preference Act of 1944 (Br. Opp. p. 18). This self-contradiction obviously results from an insupportable attempt to bring the regulations, without Commission reconsideration of them, from the area of compulsion into the area of discretion. Discretion cannot be exercised by such a verbal maneuver. The effort arises

[7] The one-year notice rule is now mandatory for employees in sub-groups A-1 and A-2 with competitive status. 12 F. R. 59 (January 4, 1947); Regulations, §§ 20.9(a), 20.10, *infra*, pp. 94-95.

from the opinion of the court below. That opinion upheld the regulations as a reasonable exercise of discretion, but denied that they were required by law (R. 56); yet the fact remains they were issued by the Commission in the belief that they were so required. *Supra*, pp. 15-18.

Sub-group A-1 Plus is also beyond the Commission's discretionary authority. *Infra*, pp. 26-29. But the point here is that the attempt to support it as the product of discretion when clearly it is not, is contrary to principles of administrative law laid down by this Court. The administrative agency here, as in *Securities Exchange Commission* v. *Chenery*, 318 U.S. 80, erred in basing its action on supposed compulsion of law. In that case this Court declined to consider the further argument pressed on appeal that the Commission's action was valid as an exercise of discretion, saying:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the adminis-

trative agency acted be clearly disclosed and adequately sustained. . . . In finding that the Commission's order cannot be sustained we are not imposing any trammels on its powers. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained". 318 U.S. at 94-95.

See also *Securities Exchange Commission* v. *Chenery*, 332 U.S. 194, 196-197; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489.

The foregoing principle is laid down with respect to quasi-judicial bodies whose findings of fact are conclusive if supported by substantial evidence and whose interpretations of law are entitled to great weight. The same principle applies with even greater force in the instant case, where the regulations of the Civil Service Commission, like those of the Selective Service Administrator, may be resorted to for guidance but "are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions". See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290. The administrative discretion vested in the Commission by Congress, whatever its scope, has not been and cannot be exercised by a simple *volte face* in course of litigation which in fact never calls into use the minds of the persons in whom the discretion is vested. If we are correct in our contention that the Commission issued the regulation setting up A-1 Plus under the belief it was compelled by the 1940 Act so to do, and that that belief was ill-founded, then the Sub-group falls. The foundation upon which it rests is withdrawn. It is left without any support.

It is submitted that the court below erred in not facing and deciding this issue regarding Sub-group A-1 Plus, separate from the issues of discretion regarding the other sub-groups, if indeed discretion was exercised in their formulation. Issues involving the security and livelihood of hundreds of thousands of Federal employees, veteran and non-veteran, should not be resolved by leaving unused the function of administrative determination to be exercised when the foundation upon which a regulation purports to rest is wholly lacking. It is indeed a rash assumption as well that the Commission would ever re-promulgate Sub-group A-1 Plus if it knew it was not required to do so. Since the Sub-group was promulgated only in the belief it was required by law, it must be assumed it will not be re-promulgated if the basis for its initial formulation, Section 8 of the 1940 Act, is found not to support it.

D. *Sub-group A-1 Plus is Beyond the Scope of the Commission's Authority Under Section 12 of the Veterans' Preference Act of 1944.*

Assuming, contrary to our contention, that respondents may properly urge here the validity of sub-group A-1 Plus under Section 12 of the Veterans' Preference Act, that sub-group is beyond the scope of the Commission's authority thereunder.

In establishing Sub-group A-1 Plus, the Commission ignored completely the requirement of Section 12 of the Act of 1944 that "due effect" be given length of service and efficiency, along with tenure and military preference. And whatever may be the scope of the second proviso to Section 12 (*infra*, pp. 38-49), it is assuredly based on elements of comparative efficiency

which are wholly ignored by the Commission in placing all returned veterans in Sub-group A-1 Plus for one year. Veterans in Sub-group A-1 Plus were given retention rights superior to all other shipfitters in the Charleston Navy Yard, whether veterans in Sub-group A-1 or non-veterans in Sub-group A-2, regardless of the "excellent" or "good" efficiency ratings of all the employees in the latter sub-groups, and the higher seniority of many of them, including petitioner (R. 27-31).

Apart from the validity of Sub-group A-1 Plus as a whole, there was no statutory authority for placing in that category 61 employees with ratings of "no efficiency" (R. 27-28). Non-veterans with ratings of "no efficiency" were placed below Sub-group A-2 on the retention register (R. 32), and hence were furloughed before petitioner and others in his sub-group were reached. And on respondents' own construction, Section 12 at best gives absolute preference in retention to veterans with efficiency ratings of "good" or better, and also at best gives veterans with efficiency ratings below "good," absolute preference over all non-veterans with equal or lower ratings. These 61 veterans in sub-group A-1 Plus lacked the rating of "good" or better needed to place them in Sub-group A-1 under present regulations. If category A-1 Plus were eliminated, veterans with ratings below "good" would go into Sub-group A-3, which has a lower place on the retention register than Sub-group A-2, reserved for non-veterans with ratings of "good" or better.

Respondents take the position that all employees in Sub-group A-1 Plus are veterans and in any event are entitled to retention preference under Sub-group A-1 as against petitioner and other non-veterans, regardless of the validity of Sub-group A-1 Plus (Br. Opp. p. 16).

The issue cannot be avoided in this manner. If Sub-group A-1 Plus is held invalid, it cannot be assumed that the regulations in all other respects would be retained by the Commission as now written; and this Court will not take upon itself the discretionary authority vested in the first instance in the Commission. See *Siegel* v. *Federal Trade Commission*, 327 U.S. 608, 613-614; *Addison* v. *Holly Hill Fruit Products Co., Inc.*, 322 U.S. 607, 619-623; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94-95; *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. Moreover, unless Sub-group A-1 Plus is valid all employees therein, though veterans, are not entitled to preference over petitioner under the Veterans' Preference Act of 1944, even as construed by respondents. As we have already shown (*supra*, pp. 26-27), petitioner is clearly aggrieved by the Commission's regulations establishing Sub-group A-1 Plus, whereby at least 61 veterans with ratings of "no efficiency" were placed above him on the retention register, without authority in law, for the statutory period of one year. As a result petitioner was reached on the register and furloughed in reduction-in-force before these men were reached (R. 22).

Respondents argue that it was not deemed "administratively necessary" to give an efficiency rating, prior to the expiration of "their year of absolute preference", to persons classified as "Leadingman Shipfitter", who had demonstrated ability before they had been promoted to that classification. And respondents further contend, "there is nothing to show that they would not all have been given a good or better efficiency rating, based on past services, had it been necessary to do so at the time of their re-employment" (Br. Opp.

p. 15, note 10). This argument is without substance. Petitioner and the 61 men with "no efficiency" ratings were all classified, not as "Leadingman Shipfitter", but as "Shipfitter", and so appeared on the register for that class of employees (R. 25, 27-28, 30).[8] This is not a category of supervisory position; and there is no factual basis whatever for assuming that all 61 would have received a rating of "good" or better, or even that any of them had such ratings before induction into the armed forces. Since the case arises on the affirmance of a judgment granting respondents' motion for summary judgment, any genuine issue of fact material to this and other aspects of the case should be resolved in favor of petitioner rather than respondents. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 623-624, 627; *Arenas* v. *United States*, 322 U.S. 419, 431-433; *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265, 266 (App. D. C.); *Weisser* v. *Mursam Shoe Corp.*, 127 F. 2d 344, 346 (C.C.A. 2d).

We submit that Sub-group A-1 Plus as here applied finds no support in Section 12 of the Veterans' Preference Act of 1944 or in any discretionary authority flowing therefrom. And lacking the authority under which it was issued, namely, Section 8 of the Selective Training and Service Act of 1940, it should now be set aside.

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[8] Petitioner had been a "Leadingman Shipfitter" at one time (R. 3), but had been demoted from that position to "Shipfitter" in a reduction-in-force under present regulations. *Id.* There are no employees with ratings of "no efficiency" on the register for "Leadingman Shipfitter", and none in Sub-group A-1 Plus on that register (R. 20-21).

II

SUB-GROUP A-1 IS INVALID

A. *Sub-group A-1 Was Established by the Commission in the Belief It Was Required by Section 12 of the Veterans' Preference Act of 1944.*

It will be helpful at the outset to clarify the issue regarding Sub-group A-1. Respondents argued below that Congress "did not see fit to allow the Commission any administrative latitude in this matter"; that the statute required the Commission to establish Sub-group A-1 in the regulations governing reductions-in-force. The court below expressly controverted this view of the Commission that "the regulations as drawn represent the only possible method of applying the statute" (R. 56). Congress did not mean to foreclose the Commission, the court said, "by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel" (R. 56). Nevertheless the court sustained Sub-group A-1 along with the other regulations because "we cannot say that this was an unreasonable method" of applying the statute (R. 55). Respondents now reiterate that the statute "required the Commission to act as it did,. . . . we shall urge that point should certiorari be granted" (Br. Opp. p. 17). They now add, however, that the regulations are presently in force "because the Commission so desires and constitute a voluntary expression of the Commission's views". *Id.*, p. 18.

We believe it is demonstrable that Sub-group A-1 is neither required by Section 12 of the Act nor within the scope of the Commission's discretionary authority

thereunder. It is submitted first, however, that here, as with respect to Sub-group A-1 Plus, if the agency has misconceived the law rather than exercised its discretion in an area which Congress has entrusted to it, the judgment below should be reversed without more. The Commission cannot forestall the corrective powers of this Court by verbally changing at this stage of the litigation the basis of its original action. *Supra*, pp. 23-26.

We turn now to a comprehensive examination of the Act and its legislative history, from the standpoint both of statutory requirement and administrative discretion.

B. *Sub-group A-1 Is Neither Required Nor Authorized by Section 12 of the Veterans' Preference Act of 1944.*

1. ANALYSIS OF THE ACT.

Objectives. The purpose of the Veterans' Preference Act of 1944 was recently stated by this Court in *Mitchell v. Cohen*, decided March 8, 1948, No. 130-131, this Term, as follows:

> "The Veterans' Preference Act was enacted in 1944 to aid in the readjustment and rehabilitation of World War II veterans. It was felt that the problems of these returning veterans were particularly acute and merited special consideration. Their normal employment and mode of life had been seriously disrupted by their service in the armed forces and it was thought that they could not be expected to resume their regular activities without reemployment and rehabilitation aids. The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preference and protection for returning veterans at every stage of federal employment."

The Act is one aspect of a comprehensive post-war program developed by the Federal Government for the millions of World War II veterans, including aids toward employment and unemployment insurance, formal education, technical training, and ownership of homes, farms and independent small business.[9] All are embraced in a broad-gauged plan framed so far as humanly possible to re-establish the veterans as citizens in a healthy national economy. As stated by the President in a message to the Congress on "Post-War Benefits to Veterans of the Armed Forces":

> "The returning soldier and sailor and marine are a part of the problem of demobilizing the rest of the millions of Americans who have been working and living in a war economy since 1941 . . . But the members of the armed forces have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems". H. Doc. No. 361, 78th Cong. 1st Sess., p. 1.

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[9] See 58 Stat. 284, 38 U.S.C. § 693; Statement by the President on signing S. 1767, the Servicemen's Readjustment Act (June 22, 1944), in U. S. Code Congressional Service, 78th Cong., 2d Sess., p. 1400; H. Doc. 361, Message from the President, *Post-War Benefits to Veterans of the Armed Forces*, 78th Cong., 1st Sess. (1943); H. Doc. 344, Message from the President, *Post-War Educational Opportunities for Service Personnel*, 78th Cong., 1st Sess. (1943); *Demobilization and Readjustment*, Report of the Conference on Post-War Readjustment of Civilian and Military Personnel (National Resources Board, 1943).

One-sixth of the Federal budget is currently devoted to veterans' services and benefits. H. Doc. No. 456, 80th Cong., 2d Sess., p. M11. There are approximately 18,600,000 veterans in the United States, including 14,700,000 veterans of World War II. Within a decade, veterans and their immediate dependents will constitute more than two-fifths of our entire population. *Id.*, p. M21.

The answer to the problem of statutory construction must be sought "by examination of the statutory scheme rather than by reliance upon dictionary definitions". *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. "Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words". *United States* v. *Dotterweich*, 320 U.S. 277, 280. No matter how "clear the words may appear on 'superficial examination'", *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 544, "resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes". *Markham* v. *Cabell*, 326 U.S. 404, 409. See also *Chicago & Southern Air Lines Inc.* v. *Waterman S. S. Co.*, decided Feb. 9, 1948, Nos. 78, 88, this Term.

The statutory plan is best summarized in a letter by the President to the Chairman of the House Committee on Civil Service dated February 26, 1944, indorsing the measure:

> "I believe that legislation relating to preference for veterans in positions in the Federal civil service should include, among others, the following points:
>
> "1. Authority should be granted, during the war and for a period of 5 years following the war, to restrict to veterans examinations for such positions as may, from time to time, be designated by the President . . .
>
> "2. Where competition is not restricted solely to veterans, provision should be made for adding points to the earned ratings of veterans who compete for positions in the Federal civil service.

"3. The Civil Service Commission should be given the authority to determine whether or not the reasons advanced by appointing officers for passing over veterans on lists of eligibles are valid . . .

"4. Veterans should be accorded special consideration in connection with any reductions in total personnel which it may be necessary for Federal agencies to work out from time to time".

"It is my understanding that H. R. 4115, as introduced by the Honorable Joe Starnes, of Alabama, is in substantial conformity with the principles above outlined". H. Rep. No. 1289, 78th Cong. 2d Sess., p. 5.

The meaning of Section 12 and the validity of the Commission's regulations thereunder must be ascertained in the light of the foregoing statements of the scope and objective of the statute as a whole.

An analysis of the statute for this purpose could well begin at either of several places. A convenient point of beginning is the substantive provision of Section 12 that the regulations "shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings". Each of these factors must be defined and related to the other. Neither is superior, although there is inherent in "military preference" the idea of a factor due to military service alone which otherwise would not exist. On the other hand, the very use of the phrase "military *preference*" instead of "military *service*" in this context shows that there are other factors or incidents of employment, concerning non-veterans as well as veterans, which must be weighed in the scales with the fourth, "military preference", before the effect of the latter can be ascertained. The task of statutory construction is to ascertain the mean-

ing or content of the "preference" here referred to and the point or points at which it turns the scales in favor of the veteran [10] in relation to the non-veteran.

Meaning of "military preference" under Section 12. The terms tenure of employment, length of service, and efficiency ratings, considered alone, are known quantities requiring no definition in the Act. "Tenure of employment" refers simply to the degree of permanency of employment as shown by personnel records. It was unnecessary for the statute to define the term and it does not do so. So too with length of service; it is the product of a mathematical calculation from the personnel records. Efficiency ratings also need no special statutory definition. An employee's records show whether his rating is "good", "excellent", or the like.[11]

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[10] The term "veteran" is used as including one who derivatively acquires preference through a veteran, as a wife or widow.

[11] The Commission has assigned numerical scores to efficiency ratings geared to the scoring of length of service. Such scores have varied widely since adoption of the Veterans' Preference Act of 1944. The regulations first issued under the Act gave 1 retention credit for each year of service, plus points for efficiency weighted at 80 for "good", 88 for "very good", and 96 for "excellent". Thus "an employee with a rating of 'very good' has an advantage over a 'good' employee equal to 8 years of seniority. An 'excellent' employee has an advantage over a 'good' employee equal to 16 years of seniority". See *Questions and Answers on New Reduction-in-Force Regulations*, U. S. Civil Service Commission Release (Aug. 8, 1944); *Departmental Circular No. 510*, § 2, (Nov. 15, 1944), 9 F. R. 13700. Increased weight was later given to length of service in relation to efficiency, by allowing one point for each year of service plus 5 points for "excellent" efficiency rating. Regulations, § 12.302(c), 10 F. R. 12181 (Sept. 27, 1945). This was in turn amended by adding 3 points for efficiency ratings of "very good" and 1 point for "good". Regulations, § 20.2(c), 12 F. R. 1391 (Feb. 25, 1947).

"Military preference" alone of the four factors is not self-defining, but calls for its particular definition when used in Section 12 where reduction-in-force is the employment problem dealt with.

Military preference has no fixed meaning. It varies throughout the statute. While the persons given "preference" under Section 2 of the Act may be ascertained from the personnel records, the "preference" accorded is an unknown quantity applicable to this known class of persons until its content is disclosed by the provisions of the statute covering a particular employment problem. This scheme of the statute is made plain by illustrations drawn from its text. Thus, those with military preference who *apply* for positions are given five points not available to others, Sec. 3, and their names are listed on appropriate registers ahead of all others having the same rating. Sec. 7. This constitutes their "preference". If the applicant is a wounded veteran, ten points are given, Sec. 3, and (except in professional or scientific positions with salaries exceeding $3000 per year) their names are placed at the top of appropriate registers in accordance with their augmented ratings. Sec. 7. If the applicant is the wife or widow of such a veteran, the same is true. *Id.* Again, if the functions of an agency are *transferred,* those with military service in such agency are transferred to the absorbing agency if they are qualified before that agency may employ anyone from another source. Sec. 12, third proviso. They do not replace non-veterans in the absorbing agency; they are preferred over new employees. This constitutes their "preference". Again, if there is an *examination* for guards, elevator operators, messengers, and custodians, and veterans are available, they have a monopoly of these positions. Sec.

3, proviso. This is their "preference" in this particular situation.

On the issue here involved, reduction-in-force, we look to Section 12 for the content of the preference. This content is found entirely in the first and second provisos of that section. It has the weight there given and nothing more. The first proviso makes clear that time spent in the armed services is to be counted in length of total service. This is the initial statutory content of military preference in reduction-in-force, and is a principle not found in the texts of the Acts of 1876, 1912, 1919 and 1929 on this subject. *Infra,* p. 59. By Section 12, that principle applies generally throughout the veteran's period of service, thus settling for Government employment a problem left open as to private employment in *Trailmobile* v. *Whirls,* 331 U.S. at 60. The content of the preference is completed by the second proviso, which deals solely with the factor of efficiency. It provides that a veteran, whose length of service now includes the period of his military service, shall in addition, if his efficiency rating is "good" or better, be preferred over "all other competing employees", and if his efficiency rating is below "good" he shall nevertheless be preferred over "competing non-preference employees" with the same or lower efficiency ratings. In other words, the veteran's rating of "good" is superior to the non-veteran's rating of "very good" or of "excellent". The second proviso, read in the full context of Section 12, is related solely to this efficiency factor. It modifies only the efficiency rating language of the provision to which it is attached. It does not purport to read out of the statute the preceding language which specifies that effect be given also to tenure of employment and length of service.

This is the full statutory definition of "military preference" as used in Section 12 where reductions-in-force are involved. It has to do with length of service and efficiency ratings; it constitutes modification of each of these factors in favor of the veteran. It does not remove the necessity of comparing this modified status of the veteran's length of service and efficiency ratings with the length of service and efficiency ratings of the non-veteran. These have not been eliminated from the statute but merely modified in his favor where the veteran is involved. The second proviso cannot be read in isolation from the language which precedes it and which it qualifies.

Relation of "military preference" to the other three factors in Section 12. With the definition of "military preference" in mind, we are now in position to read with meaning the provision that "in any reduction in personnel . . ., competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings . . ." Having in mind the meaning of each of these four factors to be given effect, the remaining task of statutory construction is to relate these factors to each other and thus to ascertain the scope of permissible regulations. We have seen that where a veteran is concerned, two of the other three factors are modified; that is, time in the armed forces is included in his total "length of service"; and "efficiency ratings" are weighted in his favor. Length of service and efficiency ratings, both as modified in favor of the veteran, and tenure of employment, are now to be given effect in the process of grouping, or ranking, of employees for purposes of reduction-in-force. Each is to be given due

effect in relation to the other according to its nature and meaning; the hitherto unknown quantity "military preference" now becomes a part of length of service and of efficiency ratings whenever a veteran is involved. Whatever method or order of grouping is adopted, the veteran with a rating of "good" is to be preferred over the non-veteran having the same tenure and aggregate length of service. This is the total of the meaning of "military preference".

We do not suggest that the Commission, in relating all factors, is required to establish infinite gradations of length of service, counting the exact days, weeks, months or even years. The Commission is not without discretion, for administrative convenience or because of sound employment policy, to determine what period or periods of service shall be considered of equal weight; i.e., whether to give the same number of retention credits for each year, three-year or at most five-year period, or whether to give increasing weight as the years of service increase. In keeping with the second proviso, the veteran with a rating of "good" would be preferred over the non-veteran with the same tenure and total period of service, whatever method is adopted to determine that period.

In this way, we "construe the separate provisions of the Act as parts of an organic whole, and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits". *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285. See also *McDonald* v. *Thompson*, 305 U.S. 263, 266; *Petition of Public National Bank of New York*, 278 U.S. 101, 104; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115.

This analysis of "military preference" under the Act accords with the statutory objective to aid the veteran in obtaining a new position in Government service. It also gives him special consideration in reestablishing himself in Government service if he had previously been employed there, but without committing the error of setting him above and apart from the national interest by a form of super-seniority.

In establishing Sub-group A-1, the Commission gave greater than this defined weight to military preference and failed to give due effect to each of the factors set forth in Section 12. Absolute effect is given by the Commission to tenure of employment in the first step in the process of grouping by placing in group A both veterans and non-veterans with permanent tenure. The second step in the process performed by the Commission, however, includes in Sub-group A-1 only veterans who have a "good" or better efficiency rating, excluding all non-veterans. The Commission in this manner fully completes its basic grouping, and in neither of the two critical steps thus taken, which determine the decisive order in which employees are to be selected for reduction-in-force, is length of service even considered. The Commission should have suspended its completion of the basic grouping until length of service was accorded weight. The Commission, however, excludes all consideration of length of service, on whatever basis, between the employees as a whole and limits its effect only to those which it places in sub-groups set up, in disregard of this factor, separate and apart from one another. This gives length of service no true significance in the regulations. It reduces this factor to a third-rate item used merely as a convenient method of distinguishing between employees already grouped

without regard to length of service. Clearly length of service is entitled, by its place in the statute as well as by its nature, to consideration in determining the composition of the groups themselves. This is the crux of the matter.

Respondents urge that the regulations properly give "greater weight" to military preference than to length of service, and that petitioner seeks greater weight to length of service than to military preference. The fallacy of this contention is its assumption, first, that one of these two factors must be chosen for greater weight rather than that each be given its true weight; and, second, that petitioner in any manner subordinates military preference. No choice between the two is presented when each is given its true meaning and effect. Petitioner gives to "military preference" the full weight given by its statutory meaning. The point is that the Commission has failed to give appropriate weight to length of service. The importance of length of service in the statutory scheme is emphasized by the first proviso in reserving for the veteran in computing his total service the period of his armed service. We submit that this factor cannot be left out of consideration in the ranking or grouping of veterans *vis-a-vis* non-veterans, as the Commission has done.

Respondents argued below that Section 12 "commands" the establishment of Sub-group A-1, giving "military preference" an absolute effect in reductions-in-force. But where Congress intended that veterans be given absolute preference under this Act it used plain words manifesting that intention. For example, Section 3 provides that in examinations for guards, elevator operators, messengers, and custodians, "competition shall be restricted to persons entitled to prefer-

ence under this Act as long as persons entitled to preference are available". Section 7 provides that 10-point preference eligibles, as defined in Section 3, go to the top of the appropriate register for employment (except in professional or scientific classifications with salary exceeding $3000 per year), instead of being entered "ahead of all others having the same rating", as in the case of 5-point "preference eligibles".

These are instances of high preference given certain veterans on *entrance* into Government employment. There is no such legislative directive that absolute preference be given "preference employees" in Section 12. In fact the third proviso of that very section, likewise applicable to "preference employees", provides that where functions are transferred to a new agency, preference employees shall be transferred to that agency for employment in positions for which they are qualified before "additional employees" are appointed "from any other source". These "preference employees" as that term is used and understood in Section 12 have no absolute preference to displace non-veterans already employed. *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 9-10.

It is obvious that if the Commission has not departed from the statute in disregarding length of service in the basic groupings, then it assuredly has departed from the statute in giving tenure of employment the effect accorded by its regulations. In other words, if the Commission is correct in arguing that it cannot give effect to length of service in the basic grouping because under the second proviso it must give absolute preference to the veteran with a "good" rating, then at the same point it must disregard tenure of employ-

ment as well as length of service. Any construction of the second proviso which justifies such disregard of length of service necessarily carries down with it any justification for giving effect to tenure of employment in the basic grouping. Such a construction would require that regardless of both tenure and length of service a veteran's efficiency rating alone, if "good", furnishes the basis for the first grouping of all "competing employees". The Commission cannot in reason have it both ways.

The point becomes clearer if we read the second proviso as the Commission reads it:

> Provided further, That preference employees whose efficiency ratings are good or better shall be retained in preference to all other competing employees *with the same tenure of employment but without regard to length of service,* and that preference employees whose efficiency ratings are below good shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings *and the same tenure of employment, without regard to length of service.*

The Commission thus fully recognizes that the preference granted the veteran by the second proviso on the basis of efficiency rating does not require the Commission to disregard tenure of employment, and accordingly that the preference is not absolute. By the very same reasoning the Commission must recognize that the same preference provision does not require it to disregard length of service.

The character of the "due effect" required to be given to each cannot be so distorted as first to give one factor, tenure of employment, absolute effect, then to give military preference absolute effect, and to give

the other factor, length of service, no effect in the original grouping. The unreasonableness of this construction is seen in the fact that at the outbreak of World War II, only a six-month probationary period was required to establish permanent tenure for purposes of the present reduction-in-force regulations.[12] Indeed a returning veteran may have established permanent tenure by serving only a few weeks or days in a probationary period before his induction, since time spent in military service is counted to complete the probationary period. *Departmental Circular No. 438,* October 22, 1943, 12 F.R. 1283 § 2.113. Yet under respondents' construction the veteran with a rating of "good" who has established his "permanent tenure" in this manner is given absolute preference over the most seasoned career employee with many years of service and an excellent efficiency rating.

As already stated, petitioner's position in that regard does not make length of service or any other factor controlling unless in fact any one factor in the case of any particular employee is decisive by reason of all others being equal, except of course a rating of "good" held by a veteran always supersedes a "good" or better rating of a non-veteran with equivalent tenure and service. This gives effect to length of service, with more reason, only as the Commission has given effect to tenure of employment when it is of higher character. Once

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[12] Rule VII 2(c), U. S. Civil Service Commission, 5 F. R. 4447 November 13, 1940. For war service appointments made after June 8, 1942, the "trial period" was one year. *Departmental Circular 323,* Feb. 28, 1942. Such war service appointees are normally not embraced in retention group "A" under existing reduction-in-force regulations. § 20.3. The probationary period for permanent appointments is now one year. Rule I, § 2.113, 12 F. R. 1283 (Feb. 25, 1947).

the advantages of military preference are added to the retention status of a veteran, there is no question of subordination or, conversely, of a controlling effect, except as these added criteria give the advantage to the veteran which otherwise would not exist. This is his preference. The statute however does not, as the Commission does, eliminate length of service as a measuring rod in the competition between veteran and non-veteran. The statute steers a middle course, rejecting sole reliance on either seniority or military service, in line with Congressional rejection of the 1943 and 1947 veterans' preference bills based on these factors alone. *Infra*, pp. 51, 71-72. If tenure of employment can be considered in establishing basic groupings it follows that length of service should be so considered.

The same result is reached by examining the issue in an alternative manner from the standpoint of the scope of the phrase "all other competing employees" in the second proviso. The Commission's argument begs that question as the opinion below points out (R. 56). The term "competing employees" is not defined in the Act or the regulations. § 20.2. Its broadest interpretation is presumably all Government employees on the same "competitive level", that is, in the same grade of the same trade in which interchange is feasible, as defined in the regulations (§ 20.2(j)), in all agencies anywhere in the United States. Obviously it must first be narrowed to the "competitive area", that is, the field installation of the particular "government entity". §§ 20.2(h) and (i), 20.7. For purposes of this further analysis, let us re-examine the statutory language:

> "*Provided further*, that preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose

efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings".

In its basic groups the Commission gives preference to the non-veteran with permanent tenure over the veteran with inferior tenure even though the latter has a "good" or better efficiency rating. It thus recognizes either that tenure must be given due effect among *all* shipfitters in the Charleston Navy Yard, or that "all other competing employees" excludes shipfitters in that Yard having war service tenure. On either construction, there is no basis for omitting comparable important consideration of length of service which, like tenure, must be given "due effect".

In our view, the phrase "all other competing employees" takes its content, in the natural reading of the language, from the efficiency rating context of the second proviso; that is, a veteran with a "good" rating takes precedence in efficiency rating over veterans and non-veterans with a lesser rating and over non-veterans with an equal or even a higher rating. *Supra*, pp. 35-38. There is no material difference in this respect between the first and second clauses of the proviso growing out of the difference between the terms "all other competing employees" and "competing non-preference employees" etc. The variation in language arises simply because an efficiency rating of less than "good" supersedes in rank nothing but the equivalent rating of a non-veteran; whereas the "good" rating of a veteran outranks all non-veterans' ratings, from "excellent" down. As shown above, pp. 37-39, the second proviso as a whole is attached to the preceding provision and has no meaning which is separate and apart from the language which it qualifies, namely that relating to efficiency ratings. It cannot be read to destroy the other

preceding language which specifies that effect must be given to tenure of employment and length of service, unless that conclusion is assumed in advance by an unwarranted construction of the phrase "all other competing employees".

Sub-group A-1 exceeded the Commission's discretion. The foregoing has demonstrated that Sub-group A-1 is neither required by the statute nor justified by any reasonable test of statutory discretion. To conclude that the insignificant weight given to length of service therein is permissible under the statute is to say that the Commission is at liberty to divide Federal employees into groups which fix their retention status on reduction-in-force without regard to length of service, in the face of the statutory requirement that due weight be given the length of service of all employees. Length of service cannot be given effect among the employees as a whole if it is only given effect as the Commission does within separate compartments or sub-groups of employees established without the interplay of this factor between the members of these separate sub-groups. This inferior weight to length of service, alone of the statutory factors, cannot reasonably be read into the statute. It practically wipes out all significance of years of faithful service, which were required by Congress to be given effect on an equality with the other factors. Length of service is used only as a measuring rod between those whose principal status has already and otherwise been fixed. Congress did not so intend. The importance Congress attached to length of service is shown not only by its inclusion among the basic factors to be given effect, but by the terms of the first proviso of Section 12, which makes certain that service in the armed forces be included in the veteran's total length of service. In ascertaining

the intent of Congress, appropriate effect must be given to these clauses and parts of the section. See cases cited *supra*, p. 39. The process of interpretation "misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve". *Markham* v. *Cabell*, 326 U.S. 404, 409. Respondents' construction moreover leads to unjust and unreasonable results that should be avoided in determining the Congressional purpose. *Infra*, pp. 73-78. Length of service being one of the basic facts to be given effect, it must be felt in the basic groupings, else it cannot be said the Commission has remained within the scope of the discretion provided by the statute. *Cf. Addison* v. *Holly Hill Fruit Products Co.*, 322 U.S. 607, 616-618.

Nor has the Commission here exercised the discretion, which we concede, *supra* p. 39, to determine what period or periods of service may be equated for purposes of retention. If appropriate sub-groups had been established by the Commission on that basis, the veteran with "good" efficiency within each such sub-group would have been retained in preference to all non-veterans with equivalent tenure and length of service.[13] Instead of establishing sub-groups on this basis,

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[13] For example, a type of grouping conforming to petitioner's interpretation while maintaining the general framework of existing regulations, is the following:

Group A—Veterans and non-veterans with permanent tenure and efficiency ratings of "good" or better, ranked in sub-groups as described below in descending order of length of service (including military service), veterans being placed ahead of all non-veterans within each sub-group.

Sub-group	A-1	more than 15 years				
"	"	A-2	12	to 15	years,	inclusive
"	"	A-3	8	to 11	"	"
"	"	A-4	4	to 7	"	"
"	"	A-5	0	to 3	"	"

the Commission's Group A and Sub-group A-1 deny any effect whatever to length of service as between veterans and non-veterans. In so doing, the Commission exceeded its authority under the statute.

Within each sub-group, employees with equivalent military status would be ranked in order of efficiency and length of service as the Commission may determine in its discretion.

Group B—Veterans and non-veterans with permanent tenure and efficiency ratings below "good". Same sub-groups and veterans' preference as above.

Group C—Veterans and non-veterans serving under appointments with a time limitation exceeding one year, and having efficiency ratings of "good" or better, veterans being preferred.

Group D—Veterans and non-veterans serving under appointments with a time limitation exceeding one year, and having efficiency ratings below "good", veterans being preferred.

Group E—Veterans and non-veterans serving under appointments with a time limitation of one year or less, having efficiency ratings of "good" or better, veterans being preferred.

Group F—Veterans and non-veterans serving under appointments with a time limitation of one year or less, having efficiency ratings below "good", veterans being preferred.

Another type of grouping would place in the top group A all veterans and non-veterans with more than 15 years of service (including military service) and efficiency rating of "good" or better. Sub-groups would be established for the three categories of tenure, veterans being placed ahead of non-veterans within each sub-group. Employees with equivalent military status in each sub-group would be ranked in descending order of efficiency: i.e., a veteran with "excellent" outranks a veteran with "good" having the same period of service. Groups B, C, etc. would be established in like manner for descending periods of service.

Similar results could be obtained by assigning point credits to efficiency and length of service, weighted in the Commission's discretion, and by grouping the results in accordance with the principles above described.

2. LEGISLATIVE HISTORY OF SECTION 12

Our construction of Section 12 is supported by the immediate legislative background of the statute, the legislation and administrative practices preceding enactment, and the status of the measure in Congress subsequent to enactment.

Contemporaneous history. The Veterans' Preference Act, known as the Starnes-Scrugham Law,[14] was the outcome of eight years of Congressional consideration, beginning with H.R. 5821 and H.R. 6497 in the 75th Congress. The version introduced by Congressman Starnes as late as 1943 required that in any reduction-in-force employees within each classification to be reduced shall be released in "inverse order of the length of their total federal service", the time spent in the armed forces being included in computing length of

[14] H. R. 4115 was introduced on February 3, 1944 (90 Cong. Rec. 1233), and was referred to the Committee on Civil Service. The bill was favorably reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong. 2d Sess.), and passed the House on April 17, 1944, after brief debate. 90 Cong. Rec. 3501-3507. A Senate companion bill, S. 1762, was introduced on March 9, 1944 by Senator Scrugham (90 Cong. Rec. 2401), and hearings were held on both bills by the Senate Committee on Civil Service on May 19 and 23, 1944. See *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess. The bill was reported favorably to the Senate on May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong. 2d Sess.), and passed the Senate, as amended, without debate, on June 12, 1944. 90 Cong. Rec. 5785. The House concurred in the Senate amendments, without debate, on June 20, 1944. 90 Cong. Rec. 6283. The bill was approved on June 27, 1944. 90 Cong. Rec. 6712.

service. H.R. 882, 78th Cong. 1st Sess. Sec. 12.[15] In a letter dated February 23, 1943, the Commission advised Chairman Ramspeck of the House Committee on Civil Service that it is "opposed to the enactment of H. R. 882 because many of its features are contrary to economy and good business administration". The letter recommended changes in various sections, including the following on reductions-in-force:

> "Section 12 of the bill provides that in any reduction of personnel in any civilian service of any Federal agency employees of the class to be reduced shall be released in the inverse order of the length of their total Federal service and that time spent in active service in the armed forces shall be credited in computing total length of service. *The Commission does not believe that reductions in force should be made solely on the basis of length of service, but that consideration should also be given to the relative efficiency of the employee*". (Italics supplied.)

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[15] The section read as follows: "In any reduction in personnel in any civilian service of any Federal agency, employees within each classification to be reduced shall be released in the inverse order of the length of their total Federal service: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in such transferring agency shall first be transferred to the replacing agency, or agencies for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions".

No action was taken on the Starnes bill in 1943. By letter to Congressman Starnes dated January 31, 1944, the Commission stated:

> "In accordance with your telephone request the Commission advises you that it has again reviewed the provisions of H. R. 882 introduced by you on January 8, 1943 and advises you as follows: It will be observed that some changes have been made from the comment that was submitted to Chairman Ramspeck of the House Committee on Civil Service under date of February 23, 1943. A copy of this letter is being sent to Mr. Ramspeck . . . ."

Although the letter suggested further changes in many sections, the Commission reiterated the identical views expressed in its 1943 letter regarding Section 12, quoted above, and continued: "It is recommended that Section 12 be amended to read as follows . . ." A statement issued by the Commission on February 2, 1944, concerning the foregoing letter said in part:

> "The Commission is opposed to a provision in H. R. 882 which would provide that reductions in force should be made on the basis of length of service alone. *In its communication to Congressman Starnes, the Commission proposes a substitute provision which would provide that reduction in force would be on the basis of both length of service and relative efficiency".* (italics supplied) [Press Release, U. S. Civil Service Commission, February 1, 1944]

The bill as introduced on February 3, 1944 contained the substitute Section 12 recommended in the Commission's letter of January 31, 1944. Thereupon the Commission wrote the letter to the Chairman of the House

Committee on Civil Service, dated February 8, 1944, quoted in the House Committee Report (H. Rep. No. 1289, 78th Cong. 2nd Sess., p. 6), reading as follows:

> "H. R. 4115 has been introduced as a substitute for H. R. 882, a bill to give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed. On January 31, 1944, the Commission furnished you with a copy of its report to Representative Starnes with respect to H. R. 882. The changes which have been made in the bill are listed below.
>
> * * *
>
> "Section 12. This section of H. R. 882 provided that in reductions of personnel, employees shall be released in the inverse order of the length of their total Federal service. In accordance with the suggestion made in the Commission's letter of January 31, 1944, this section has been amended in H. R. 4115 to read: . . ."
>
> "The Commission concurs in the changes that have been made and recommends approval of H. R. 4115 as introduced."

The language recommended by the Commission is substantially that embodied in the bill as enacted. Such letters serve "in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the Act". *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 452; *United States* v. *Durkee Famous Foods*, 306 U.S. 68, 71. The Report itself (p. 4) contains the following comment on the Section as thus amended:

> "Section 12 provides for procedure in any reduction in personnel in any civilian service of any Federal agency, specific provisions appearing with

respect to the preferred status of veterans in retention. Provision is also made in this section directing that when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

This history before the Committee of Congress which made the significant change in the language from H. R. 882 to H. R. 4115, gives respondents no basis whatever for insisting that "the purpose of this change was to confer upon veterans preference in retention without regard to length of service" (Br. Opp. p. 10, note 5), Congressional rejection of the 1943 draft, giving sole weight to length of service, does not mean that the substituted language gave no weight to that factor. *Cf. Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 736-737, 740. Instead, the statute specifically requires and the legislative history confirms that length of service be given due effect as one of four factors, with the proviso that years in military service shall be counted toward seniority in civil service. Any other result is inconceivable in the face of the Commission's own recommendation to the House Committee and its insistence on principles of sound administration before giving its approval to the bill.

There is nothing to the contrary in the Senate action on the measure. In the course of the Committee hearings, respondent Flemming testified as follows:

"Senator Byrd. Suppose there was a general reduction of personnel in the Federal Government, which I think all of us realize sooner or later must occur. What preference will the veterans have as to the retention of jobs they may have?

"Mr. Flemming. There are three points which must be kept in mind. First of all, under this bill regulations will be required to give due effect, among other things, to length of service and then the next proviso specifies that any time spent in the armed forces shall be considered in determining seniority. The next point is really the most important. It provides that a veteran who has an efficiency rating of good or better shall be retained in preference to a *competing employee,* that is, a veteran with an efficiency rating of good would be retained in preference to a non-veteran with an efficiency rating of excellent.

"Finally when you get down below good, it provides that the veteran shall be retained in preference to the competing non-preference employees who have equal or lower efficiency ratings".[16] (italics supplied).

This statement of the effect of Section 12 must be understood in the light of our previous discussion of the statute. *Supra* pp. 35-46. The Commission's statement before the Senate Committee, whatever its meaning, cannot out-weigh the Commission's presentation to the House Committee, which made the critical change to the language requiring that reductions-in-force should be on the basis of both length of service and relative efficiency. *Supra* pp. 51-53. The Senate Commit-

[16] *Hearings on S. 1762 and H. R. 4115,* Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 27, 29. Respondent Flemming's additional testimony concerning the relation between the language of Section 12 and pre-existing practices, particularly the Act of August 23, 1912, is set forth, *infra,* p. 62 note 19.

tee did not appear to accept any interpretation differing from that understood by the House Committee, since its Report followed substantially the language of the House Report in its explanation of the meaning of the Section, as follows:

> "Section 12 provides the procedure to be followed in case of reduction of personnel in any agency, and requires that preference be given veterans. Provision is also made in this section to the effect that when functions of an agency are transferred to, or when an agency is replaced by, some other agency, all preference employees engaged in the function or functions transferred or in the agency which is replaced by another agency, shall first be transferred to the replacing agency, for employment in positions for which they are qualified, before such agency may appoint additional employees from any other source for such positions". S. Rep. No. 907, 78th Cong. 2d Sess., p. 3.

Even if respondent Flemming's statement before the Committee was more clearly directed to respondents' present interpretation, it could not prevail against the statutory plan itself, as manifested by the weight required by the statutory language to be given length of service and by the general purport of the statute when its several sections are read together and all phrases are given their appropriate meaning on the whole legislative background. See *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61 note 27; *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, 451-452; *United States* v. *Townsley*, 323 U. S. 557, 560-561, 566, 570; and cases cited *supra* p. 39; *cf. Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492; *Pennsylvania R. R.* v. *International Coal Company*, 230 U. S. 184, 198-199; *Pacific Gas and Electric Co.* v. *Securities*

Exchange Commission, 127 F. 2d 378, 382 (C.C.A. 9th), affirmed by an equally divided Court, 324 U. S. 826.

Previous background. Respondents main reliance in the interpretation of the Act of 1944 is on the legislation and administrative practice which preceded it. Unquestionably one purpose of the Act of 1944 was to codify in one legislative enactment all the preference rights and privileges of veterans. 90 Cong. Rec. 3503, 3505; *cf. American Stevedores Inc.* v. *Porello*, 330 U.S. 446, 452, note 13. But it is quite plain and explicit that the Act does not embody all the content of previous laws, executive orders or administrative regulations and that significant changes were made from pre-existing practices. Inadvertent statements to the contrary may not be relied upon "to make identical that which is radically different". *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198-199. They must be disregarded in the face of the overwhelming evidence of Congressional purpose shown by the Committee Reports and the language of the statute itself. See cases cited *supra*, p. 56.

The Senate Committee Report states on this issue:

> "The Congress has long recognized the desirability of granting preference in governmental employment to former members of the military and naval forces. In the past, however, veterans' preference laws have consisted for the most part of little more than broad statements of general principles, leaving details of application and administration to Executive orders and regulations. The enactment of H. R 4115, known as the Starnes-Scrugham bill, would *for the first time bring together in comprehensive statutory form the various statutes as well as the desirable provisions of Executive orders and regulations promulgated*

pursuant thereto. In addition, the bill provides for certain preferences not accorded veterans under existing law". S. Rep. No. 907, 78th Cong. 2nd Sess., p. 1 (italics supplied).

The House Committee Report likewise states:

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. *Careful consideration has been given to its provisions in the light of past legislation and practices.* . . .

"Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program. The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions". H. Rep. No. 1289, 78th Cong. 2nd Sess., p. 3 (italics supplied).

The report goes on to list changes from previous practice under ten different sections of the bill, including Section 12 on reductions-in-force. The same Committee report then lists as superseded by H. R. 4115 the earlier statutes relied upon by the Government:

"CHANGES IN EXISTING LAW

"In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, the following preference statutes enclosed in black brackets are superseded by H. R. 4115:

[Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices. In making appointments to clerical and other positions in the executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors, and marines who themselves are not qualified, but whose wives are qualified to hold such positions. (R. S. sec. 1754; July 11, 1919, ch. 6, sec. 1, 41 Stat. 37; June 18, 1929, ch. 28, secs. 3, 21, 46 Stat. 21, 26.)]

[* * * *Provided further,* That in making any appointments under this act to positions in the District of Columbia or elsewhere, preference shall be given to persons discharged under honorable conditions from the military or naval forces of the United States who served in such forces during the time of war and were disabled in the line of duty, to their widows, and to their wives if the husband is not qualified to hold such positions (46 Stat. 21, June 18, 1929; 13 U. S. C. 1940 ed. 203).]

[That in making any reduction of force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors (19 Stat. 169, August 15, 1876; 5 U. S. C. 1940 ed. 37). *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary (37 Stat. 413, August 23, 1912).]"

As for Executive Orders and administrative regulations prior to 1944 based on the foregoing statutes, they were so loosely worded or so readily avoided that the proportion of veterans employed varied from 3 percent in one agency to 75 percent in another. See *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U .S. Senate, 78th Cong. 2d Sess., p. 45.[17] The Commission has itself stressed the changes wrought by the Act in its recruitment and replacement policies and its procedures under war service regulations:

> "The Veterans' Preference Act redefined and consolidated into law the 5- and 10- point prefer-

[17] Compare the appraisal of administrative practices preceding the Act of 1944 given by a Subcommittee of the Senate Committee on Civil Service in its Report on S. 999, 80th Cong. 1st Sess., as follows: "Whereas in 1944, while the Nation was still in the midst of hostilities, the main purpose was to legislate into statute some form of preference which by law at that time did not actually exist. The Veterans' Preference Act of 1944 represents a reduction to statutory form of a rather large number of loosely worded and as loosely enforced Executive orders, rules, and regulations of a more or less questionable enforceability. The purpose of S. 999 is to provide a sort of administrative road map which can be followed with considerable clarity and understandability by examining, appointing, and administrative officers, and which can place disabled veterans in much stronger positions . . . ." The bill referred to would amend the Act of 1944 by requiring 10-point eligibles to have present service-connected disabilities of 10 percent or more; by requiring such eligibles to attain a passing grade of 70 before their grades were augmented by the 10-point preference rating under Section 3; and by placing at the head of appropriate registers (as provided by Section 7) only those 10-point eligibles whose service-connected disabilities were 30 percent or more. The bill was reported by the full Committee in amended form (S. Rep. 428, 80th Cong., 1st Sess.) and passed the Senate on July 23, 1947. 93 Cong. Rec. 10008 (daily ed.)

ences which had previously been provided by Executive order. It also provided for the reopening of examinations, for any position newly to be filled or filled within the previous three years, by applicants granted 10-point preference, and granted all preference eligibles separated, demoted, or suspended from the service the right to appeal to the Commission. In addition, it contained many other provisions affecting recruitment and placement policies. Much of the flexibility in procedures permitted by the war-service regulations was largely replaced by the specific provisions of the Act" *62nd Annual Report, United States Civil Service Commission* (1945) p. 43.

Section 18 of the Act provides:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith."

There is a further saving clause as follows:

"and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof".

The purpose of the latter clause is to protect the preference of peace-time veterans who were in Government employment and on civil service registers when the Act of 1944 was passed, and who otherwise would be excluded by its terms. See S. Rep. No. 907, 78th Cong. 2d Sess., p. 2; H. Rep. No. 1289, 78th Cong. 2d Sess., p. 3; *Hearings on S. 1762 and H. R. 4115,* Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., p. 50. This Court's holding to that effect in *Mitchell* v. *Cohen,* Nos. 130-131, this Term, accords with the interpretation

of Section 18 vigorously pressed by the Government in that case.[18]

The changes from previous law made by the Act of 1944 are nowhere more pronounced than in reference to Section 4 of the Act of August 23, 1912, 37 Stat. 413, which is strongly relied upon by the Government as the earlier prototype of the second proviso of Section 12.[19] The 1912 provision was as follows:

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[18] See *Petition for Certiorari in Nos. 130-131:* "It is clear from the legislative history that this 'saving clause', Section 18 of the Act, was only intended to preserve the preference rights of former 'peace-time' veterans then in government employment [citing the Committee reports], and was not designed drastically to widen the coverage of the Act because of a single erroneous ruling" (pp. 20-21). *Brief for Petitioner in Nos. 130-131:* "Section 18 was mainly inserted to preserve preferences granted under earlier statutes and executive orders, to so-called 'peace-time veterans'—those who had served in the armed service in peace time. The new preference act did not grant preference to future peace-time veterans, and Section 18 was intended as a 'saving clause' to preserve the rights of such veterans then in government employment or on civil-service registers" (p. 52).

[19] Respondent Flemming testified before the Senate Committee on Civil Service as follows:

"You will note the first part of the law provides [reading]:

'competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings'.

"I might say that our existing reduction-in-force regulations are in harmony with that.

"Then it goes on as follows:

'*Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service'.

"That reenacts a provision that has been in the law.

[Reading]:

> "*Provided*, That in the event of reductions being made in the force of any Executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary".

Even on the assumption that the Act of 1912 remained in full force by virtue of the saving clause of Section 18 of the Act of 1944, the latter section could be relied upon only by those veterans who were in Government employment and on civil service registers on the date of enactment, June 27, 1944. *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. The record is barren of evidence that any of the veterans in Subgroup A-1 on the retention registers herein satisfied

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'That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings'.

"That proviso is substantially the same as a law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923 . . .

"The heart of the section which is the second provision, as I stated before, was reflected in an act of 1912, which applied only to the departmental service and then was extended by Executive order of March 3, 1923, to the entire service". *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 27, 29.

The argument already made regarding respondent Flemming's testimony (*supra*, pp. 55-56), is applicable with even greater force here, in view of the overwhelming evidence throughout the legislative history that the Act of 1912 differs significantly from and was superseded by the Act of 1944. *Infra* pp. 64-68.

that test. In any event the Act of 1944 differs from the Act of 1912 in each of the following material respects:

(i) The Act of 1912 gives veterans a preference against being "reduced in rank or salary" as well as being dropped or discharged in reductions-in-force; whereas Section 12 of the Act of 1944 applies only to furloughs or discharges in reductions-in-force. Section 14, which grants administrative appeals to veterans who may be "reduced in rank or compensation", does not grant a preference to veterans. It merely provides that veterans may not be demoted "except for such cause as will promote the efficiency of the service and for reasons given in writing". In contesting suits by demoted veterans relying on their preference under the Act of 1912, the Government takes the view that the Act of 1912 has been superseded by the Act of 1944. E. g. *Breiner* v. *Wallin*, Civil No. 7694 (E. D. Pa.). The Government's "Memorandum in Opposition to Plaintiff's Motion for Rehearing" in that case argues as follows:

> *"Section 4 of the Act of August 23, 1912 has been superseded by Section 12 of the Veterans' Preference Act*
>
> "That this was the intention of the Congress is clearly evidenced by the Report of the Committee on the Civil Service of the House of Representatives on H. R. 4115 (which was enacted as the Veterans' Preference Act of 1944) . . . from which the following is quoted:
>
> "CHANGES IN EXISTING LAW"
>
> "In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, the following preference statutes enclosed in black brackets are superseded by H. R. 4115:

. . . [. . . *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary (37 Stat. 413, August 23, 1912).]'

"If further indicia of the intention of the Congress in this regard be deemed necessary, the attention of the court is directed to Section 18 of the Veterans' Preference Act which provides:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith . . . ."

"Plaintiffs rely on the last portion of Section 18 of the Veterans' Preference Act to glean from the statute of 1912, *supra,* legal rights which are inconsistent with the Veterans' Preference Act . . . The only view of Section 18 which will not result in attributing such an absurdity to the Congress is to say that by virtue of the first portion of Section 18, the statute of 1912 has been modified to conform with the Veterans' Preference Act, and that by virtue of Section 18, only those rights conferred by earlier statutes *which are not inconsistent* with the Veterans' Preference Act are preserved".

(ii) The Act of 1912 gives preference to veterans in reductions-in-force without reference to tenure, whereas the Act of 1944 requires that due effect be given this factor. The result is that veterans with war service tenure are now denied preference over non-veterans with permanent tenure. See Regulations, § 20.3. On this ground also the Government is opposing suits for reinstatement by veterans with war service tenure who argue that the Act of 1912 remains intact. E.g., *Elder* v. *Anderson,* Civil No. 2336-47, and *Furman*

v. *Anderson*, Civil No. 2335-47, District Court of the United States for the District of Columbia. The Government's "Points and Authorities" (p. 7) in support of its motion for summary judgment in the *Furman* case, filed August 15, 1947, states in answer to the veteran's argument relying on the Act of 1912:

> "This [1912] statute is inapplicable to the cause under consideration for the following reasons:
>
> "1. The statute is superseded by the Veterans' Preference Act of 1944. The Report of the Committee on the Civil Service of the House of Representatives on H. R. 4115 (which was enacted as the Veterans' Preference Act of 1944) shows specifically under the caption 'Changes in Existing Law' that the 1912 statute would be superseded by the enactment of the Veterans' Preference Act of 1944 (Report No. 1289, 78th Cong. 2d Sess. p. 7).
>
> "2. Section 18 of the Veterans' Preference Act by its specific language supersedes any earlier statute inconsistent therewith . . .
>
> "Since the Veterans' Preference Act specifically modifies all earlier inconsistent statutes to conform therewith, no claim based on an earlier statute which is inconsistent with the Veterans' Preference Act can be maintained".

(iii) There are crucial differences in the language of the two statutes. The Act of 1944 contains provisions, not found in the Act of 1912, whereby length of service is to be given due effect along with efficiency, tenure and "military preference"; the time spent in military service is to be credited in computing total service; and preference employees with efficiency ratings of "good" or better are to be preferred over all other "*competing* employees". The Act of 1912 moreover, stands alone; whereas Section 12 of the Act of 1944 must be read in

the context of a comprehensive statute, the first of its kind on the subject of veterans' preference in Federal employment.

(iv) These obvious differences in the language and purport of the two statutes reflect obvious differences in their background and objectives. The Act of 1912 was adopted before the establishment of the classification or efficiency rating systems, as part of a rider on the annual Legislative, Executive and Judicial Appropriation Act concerning civil service tenure in the District of Columbia.[20] The Act of 1944, on the other hand,

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[20] The House Committee on Appropriations recommended Section 5 of the bill (H. R. 24023), limiting civil service tenure to five years and containing no veterans' proviso. H. Rep. No. 633, 62d Cong. 2d Sess., p. 14. The veterans' proviso was added on the floor of the House. 48 Cong. Rec. 6191. The Senate Committee on Appropriations struck out Section 5, including the proviso, and inserted a new Section 4 establishing a system of efficiency ratings for civil service employees in the District of Columbia, without the veterans' proviso. S. Rep. No. 832, 62d Cong. 2d Sess., p. 7. The Conference Agreement included both Sections 4 and 5 (limiting tenure to 7 years), with the veterans' proviso attached to each Section. H. Doc. 910, 62d Cong. 2d Sess., pp. 66-67. In this form the measure was vetoed in toto by the President, because of his objection to the 7-year clause of Section 5 and to another rider abolishing the Commerce Court. *Id.*, pp. 1-4. The measure as finally adopted and approved dropped Section 5 and retained the preference proviso as a limitation on Section 4. On enactment, the proviso applied only to the relatively small number of civil service employees in the District of Columbia. See *Wettre* v. *Hague*, 74 F. Supp. 396, 398 (D. Mass). Section 4 was amended by the Act of February 28, 1916, 39 Stat. 15, which constituted the Bureau of Efficiency an independent agency and transferred thereto the functions of the Commission under the Act of 1912. The Bureau of Efficiency was abolished by the Act of March 3, 1933, Sec. 17, 47 Stat. 1519, and its records and property transferred to the Bureau of the Budget.

is a comprehensive statute codifying Congressional policy on this subject and enacted after eight years of legislative consideration. The variations from pre-existing practices generally, and from the Act of 1912 in particular, have already been set forth. Not only is the Act of 1944 comprehensive in itself, but it is an integral part of an even broader legislative program for re-employment and rehabilitation of veterans of World War II.

This Court has rejected a literal reading of a section carried over intact from an earlier statute but placed in an amended and different statutory setting. *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 488-489. *A fortiori*, such an unrealistic interpretation should be rejected in the instant case where differences in the statutory language are sufficient in themselves to justify a different result, apart from major differences in the context of the particular language, section and Act.

Subsequent history. The Act of August 8, 1946, 60 Stat. 939, granted special retirement privileges to employees over 55 years of age who were involuntarily separated in a reduction-in-force after 25 years of ser-

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At the outbreak of World War II, the Commission's regulations for retention preference in reductions-in-force "were applicable only to that part of the Federal departmental service in the District of Columbia which was subject both to the Classification Act of 1923, as amended, and to the Civil Service Act, covering approximately 83,000 employees. A few civil-service rules and regulations had a bearing on reductions in force in the field service but only with respect to type of appointment and veteran preference. Greater authority was conferred upon the Commission by the Veterans' Preference Act of 1944 . . ." See *62nd Annual Report of the Civil Service Commission* (1945) p. 57.

vice, during the two-year period ending June 30, 1947. The immediate occasion for this legislation, known as the Forand Act, was stated as follows by its author in testimony before the House Committee on the Civil Service:

> "The introduction of this bill was prompted by the situation which was created in the city of Newport, R. I., when the Navy Department, in cold blood and without regard to the human element involved, discontinued the manufacture of torpedoes at the Newport Naval Torpedo Station, the oldest torpedo station in the country, and took over from a private employer a war plant at Forest Park, Ill., built with Government funds and now manned by personnel that was blanketed into the civil service, so to speak in the fall of 1945. . . .
>
> "I hold here in my hand a list of 231 employees of the Newport Torpedo Station who have been separated since last August up to May 6 of this year. Every one of the men listed on this paper has more than 25 years of service to his credit, yet in most instances he has not reached the age of 55, and thus is not permitted to receive even the reduced annuity provided in the civil-service laws for those who have reached the age of 55. Yet these men find it almost impossible to secure employment with private industry because of their age". *Hearings on H. R. 4718, Committee on the Civil Service*, House of Representatives, 79th Cong. 2nd Sess., pp. 3-4.

The hearings disclosed other such instances of drastic curtailment of Government activities in arsenals, shipyards and similar installations due to cessation of hostilities. *Id.*, pp. 15-16, 37, 38, 52. The Springfield Arsenal, for example, was cut back from 14,000 employees at the peak of war production to 2,200 shortly after V-E day. *Id.*, p. 52; see also 92 Cong. Rec. 9016,

9017, 9018. Cogent grounds were advanced for permanent legislation of this type, providing adequate retirement for employees involuntarily separated after long service. *Hearings on H. R. 4718, supra,* pp. 44-49, 53-55, 61, 62, 71-72, 98. Such permanent legislation has since been enacted. Public Law 426, approved February 28, 1948, Sec. 1.

In addition to displacement of long-service employees in drastic cut-backs, there are various references in the legislative history of the Forand Act to the displacement of career employees by returning veterans. E.g., H. Rep. 2443, 79th Cong. 2d Sess., p. 1. Such displacement would occur to some extent under valid regulations under Section 12 of the Veterans' Preference Act, varying somewhat with the type of grouping. On the other hand, many such displacements would not have occurred in the absence of Sub-group A-1 Plus. In all the circumstances, the factors entering into an appropriate retirement plan, temporary or permanent, must stand on their own merits, without implying that Congress thereby approved the Commission's particular reduction-in-force regulations. While Congress may be understood as having recognized the impact of the Veterans' Preference Act, it cannot be deemed to have passed on the validity of the regulations here involved when it enacted the Act of August 8, 1946. That statute is far from a Congressional reaffirmation of an administrative regulation of long and undisputed standing, with full consideration of its implications and validity. *Cf. Helvering* v. *Winmill,* 305 U. S. 79, 83. Rulings or regulations of the Commission, unlike *inter partes* decisions of quasi-judicial agencies, may be resorted to for guidance but are not entitled to persuasive weight. *Cf. Fishgold* v. *Sullivan Drydock & Repair Corp.,* 330 U. S.

275, 290, *aff'g.* 154 F. 2d, 785, 789-790 (C. C. A. 2d). In the construction of statutes, this Court has frequently had occasion to deny prevailing weight to subsequent legislative action, either because it was itself inconclusive or because the earlier statute itself clearly manifested the Congressional purpose. *Id.; United States* v. *United Mine Workers of America,* 330 U. S. 258, 282-283; *United States* v. *Townsley,* 323 U. S. 557, 570-572; *United States* v. *Southeastern Underwriters Association,* 322 U. S. 533, 559-560; *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 301; *Louisville & Nashville Ry. Co.* v. *United States,* 282 U. S. 740, 757-759. In *United States* v. *Townsley, supra,* three subsequent statutes were deemed based upon a misapprehension of the effect of the statute under interpretation.

In the hearings on the Forand bill, Congressman Rees, ranking minority member and more recently House Committee Chairman, remarked to one witness: "I have introduced legislation that is now pending before this Committee whereby I tried to spell out what I think the Congress intended in the Veterans' Preference Act". *Hearings on H. R. 4718, supra,* p. 9. The bill referred to would amend Section 12 of the Veterans' Preference Act by specifically placing military service ahead of all other factors in reductions-in-force. H. R. 5979, 79th Cong. 2d Sess. Congressman Rees succeeded to the chairmanship of the Committee in the 80th Congress. On January 9, 1947, he re-introduced H. R. 739, substantially to the same effect, as follows:

> "Whenever reductions in personnel, reductions in grade, or demotions are necessary in any Federal agency, employees shall be released, reduced, or demoted on an agency-wide basis in accordance with Civil Service Commission regulations which shall give effect to the following categories in the order

listed: First, to military preference; second, to tenure of employment; third, to length of total Federal service; and, fourth, to efficiency ratings: . . . *Provided further,* That regardless of the above categories veterans-preference employees shall be retained in any Federal agency over all other employees: *Provided further,* That employees having equal standing in any of the above categories shall be released upon the basis of their relative standing in the next lower category: *Provided further,* That the length of time spent in active service in the armed forces of the United States of each such Federal employee shall be credited in computing total length of Federal service: *Provided further,* That in any reduction in Federal personnel the effect given efficiency ratings shall be only upon the basis of satisfactory or unsatisfactory ratings".

The House of Representatives did not accept this sweeping amendment, giving absolute preference to veterans in reductions-in-force. The House Committee on Post Office and Civil Service drastically amended the measure and the House passed the amended bill reading as follows:

"In any reduction in personnel, including reductions resulting from budgetary limitations or administrative reorganizations in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That equal credit shall be given efficiency ratings of 'good' or better except that preference employees whose efficiency

> ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings . . ." 93 Cong. Rec. 9754 (daily ed. July 21, 1947).

The language as amended thus makes relatively minor changes in existing law. If anything, this shows that Congress does not concur in a construction or amendment of the Veterans' Preference Act of 1944 giving absolute preference to veterans in total disregard of the efficiency and seniority standing of career non-veteran employees. *Cf. Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 684, note 27.

In sum, the historical background of the Veterans' Preference Act of 1944 verifies and strengthens our analysis of the statute and contradicts that of the respondents embodied in Sub-group A-1. That background, when all is said and done, leaves it apparent that length of service is one of the important factors to be given weight; and it is the failure of the Commission so to do which bring the regulations into conflict with the statute.

3. HARMFUL CONSEQUENCES OF THE COMMISSION'S REGULATIONS

We are not confronted here with a borderline case in which veterans are preferred over non-veterans only slightly superior in seniority or efficiency. Petitioner had been employed in the Charleston Yard for twelve years and was rated "excellent" in efficiency (R. 4). He stood near the top of sub-group A-2 (R. 30), and had more retention credits than 131 other shipfitters

out of 143 in sub-groups A-1 and A-2 combined (R. 28-31). The bulk of the veterans retained had lower efficiency ratings and substantially lower seniority, even after crediting toward total length of service the years spent on active duty (R. 28-31).

Employment in the Charleston Navy Yard had increased from 7,000 in 1938 to 27,500 at the peak of war activity (R. 11). Most of the new employees had not had the specialized knowledge to perform the skilled tasks of building, repairing, or maintaining naval warships in the Yard during the war period. Approximately 85% of the employees now accorded veterans' preference were without prior experience in shipbuilding, and were trained by the career civil service employees whom they have now displaced under the regulations here involved (R. 12).

The Court is not left to conjecture about the impact of the Commission's regulations on efficiency of the service. The end of hostilities left the Navy with a gigantic and far-flung shore establishment approximately fifteen times larger than that existing in 1940. Within one year, civilian employment in the Navy Yards was reduced from 355,000 to 158,000 men. *Annual Report of the Secretary of the Navy* (1946) pp. 35, 40. Respondent Sullivan took occasion to stress the adverse consequences of the Commission's regulations under the Veterans' Preference Act:

> "It is, of course, inevitable that, under present regulations, many highly skilled employees will be lost. It is true that these same highly skilled employees are to a great extent responsible for the fact that our old line stations have developed, to a high degree, the ability to handle unusual and

unique industrial tasks. The older machinists, electricians and employees possess of skill in other trades could be depended upon to perform the most difficult tasks and to produce articles of highest quality dependable in service. Since a large part of the Navy's industrial operations is of a jobbing nature and of a highly specialized nature, it is indeed fortunate that this skill and ability had been well developed before the war. It is also true that the Navy was able to rapidly establish new stations at the outbreak of war because it had highly skilled personnel to call upon to serve as a nuclear force at each of the new stations. Of course, the skills and ability of individuals are independent of whether they are veterans or non-veterans. While many employees were veterans of World War I, they were, in fact, but a small percentage of the total force when World War II began. Therefore, it is safe to say that, to a large extent, the efficiency of operation of our old line stations depended on the well-developed skills of non-veterans.

"The Navy is now faced with the loss of many of these skilled persons. For the most part, veterans of World War II will be the replacements. Some of the veterans will be unskilled and others will be skilled, but in few cases will they have the necessary well-rounded experience required to meet the many complex industrial problems of jobbing activities. Without question, stations face a period of reduced overall quality and reduced ability to perform complicated and difficult tasks . . . How long this period of lessened ability will continue is unknown. . . . It will continue until the veterans now being retained in employment or newly employed absorb the "know-how" and develop the ingenuity and high skill which the old-timers had. . . . Under any circumstances this will not be an easy task and will not be accomplished except as a result of hard work carried on by alert management over a period of years" (R. 44-45).

The importance of the Navy Yards in our national defense requires little elaboration. American experience during World War II disclosed critical shortages of skilled civilian manpower for all the requirements of global war. Manpower shortages were "the greatest single problem of war procurement".[21] Invasion schedules were geared to the output of our shipbuilding and shiprepair yards.[22] The manpower needs of essential war production were balanced with those of the armed forces, with no margin to spare.[23]

Draft deferment policy was designed to retain personnel in direct order of usefulness for the civilan job to be done in aid of the armed forces afloat or in the field. At the outset of the war, the Selective Service

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[21] *Special Committee Investigating the National Defense Program, Third Annual Report*, Sen. Rep. No. 10 pt. 16, 78th Cong. 2d Sess. (March 4, 1944) pp. 23 *et seq.*; Corson, *Manpower for Victory* (1943) pp. 22-25, 102-104, 113-114.

[22] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War*, July 1, 1941 to June 30, 1943, pp. 10, 33-34; *Id., July 1, 1943 to June 30, 1945*, pp. 27, 57; *Report by the Supreme Commander to the Combined Chiefs of Staff on the Operations in Europe of the Allied Expeditionary Force, 6 June 1944 to 8 May 1945*, pp. 1, 4-5, 11-12; *Report by the Supreme Allied Commander Mediterranean to the Combined Chiefs of Staff on the Operations in Southern France, August 1944*, pp. 5-7, 32; Reports to the Secretary of the Navy by Fleet Admiral King in *U. S. Navy at War 1941-1945* (1946) p. 146. See also *Special Committee Investigating the National Defense Program, Additional Report on Shipbuilding and Shipping*, Sen. Rep. No. 10, pt. 8, 78th Cong. 1st Sess. (April 22, 1943); *Id., Additional Report on Merchant Shipping*, Sen. Rep. No. 10 pt. 18, 78th Cong. 2d Sess. (June 23, 1944).

[23] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War*, July 1, 1943 to June 30, 1945, pp. 101-107.

Administration emphasized its responsibility for occupational classification. A policy statement to local boards read in part:

> "It is the responsibility of the Selective Service System to allocate the manpower of the Nation among the armed forces, civilian activities necessary to war production, and other civilian activities essential to the support of the war effort. . . . Thus the Selective Service System, through the process of classification, must do its part to accomplish an orderly adjustment of the manpower resources of the Nation, so that all available men will properly and expeditiously be directed into that channel of activity where the Nation at war will be best served". *Local Board Memoranda, Selective Service System, 1941-1945* (1945), Memorandum No. 115, March 16, 1942.

Shipfitting was listed as a critical occupation in the essential shipbuilding and repair industry, on the lists compiled by the War Manpower Commission. *Id.*, Release No. 115, as amended August 16, 1943. The "necessary man" in a critical occupation was defined as one having the requisite degree of training, qualification or skill, who could not be replaced because of an existing shortage of trained manpower, and whose loss would seriously impair the effectiveness of the war activity engaged in. *Id.*, Memorandum No. 115, as amended Aug. 16, 1943, Jan. 6, 1944.

Federal Government employees were subject to the foregoing standards, plus the requirement that their deferment be requested by the head of the agency involved. *Id.*, Memorandum No. 115F, as amended May 18, 1944; Second Report of the Director of Selective Service, *Selective Service in Wartime* (1943) pp. 162-166, 219-222. A Government employee attempting to

volunteer for military service was denied release if the appropriate agency committee had requested or would request his deferment under the foregoing standards, unless the employee was likely to be assigned to combat duty, or his skill and ability probably would be utilized equally or more effectively in the armed forces. Executive Order 9309, Part V (Mar. 6, 1943), 50 U. S. C. App. foll. Sec. 305a. Thousands of skilled Government employees worked as volunteers in installations in war zones overseas.

Yet those very highly skilled men who in wartime were held in the shipyards rather than inducted into the armed forces, or whose years of excellent service had placed them beyond military age, are being replaced under the Commission's regulations by veterans with comparatively brief service in the yards prior to induction. And under the Commission's regulations, veterans with only a few weeks or months of Government service prior to induction can displace the most seasoned and efficient career civil service employees. *Supra*, p. 44.

This action is inconsistent with the realities of a nation at war, well comprehended by Congress when it framed the Veterans' Preference Act of 1944. The regulations are contrary to the objectives of the statute and the veterans' reemployment and rehabilitation program of which it is an integral part. They are harmful to the national defense as well as to the national economy. They strike a devastating blow at the morale, efficiency and security of the civil service. The statute should be construed to avoid such unjust and unreasonable consequences contrary to the will of Congress. *Cf. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 488-489; *United States* v. *Rosenblum Truck*

Lines, 315 U. S. 50, 55; *United States* v. *Kirby*, 7 Wall. 482, 486-487; and cases cited *supra*, p. 33.

4. CONCLUSION

The Commission's regulations are based on a misapprehension of the meaning of military preference in Section 12 and contravene the statutory plan to give appropriate weight to efficiency, seniority and tenure in relation to military service. Sub-group A-1 is not required by Section 12 of the Act and is beyond the scope of the Commission's authority under that section.

III

PETITIONER SHOULD BE GRANTED SUCH FURTHER RELIEF ON REMAND AS THIS COURT MAY DEEM JUST AND PROPER

Whether Sub-groups A-1 Plus and A-1 are invalid either because the Commission misconceived the law or misapplied the standards prescribed, it is submitted that the judgment below should be reversed and the cause ordered remanded to the District Court with direction to accord such relief as this Court may deem just and proper or which is not inconsistent with the opinion of this Court.

Relief calls for "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially". *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620. It is recognized that this Court will not itself assume to write regulations complying with the statutory standards. See cases cited *supra*, p. 28. Further relief therefore may well take the form of directing that the mandate of the District Court be withheld pending a reasonable opportunity for respondents to promulgate new regulations for reductions-in-force of Federal Government employees.

in conformity with Section 12 of the Veterans' Preference Act as construed in the opinion of this Court herein. *Cf. Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 619-623; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567-568; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the judgment of the court below should be reversed and the cause remanded to the District Court with direction for such further relief as this Court may deem just and proper.

CHARLES FAHY,
PHILIP LEVY,
WALTER B. WILBUR,
Attorneys for Petitioner.

March, 1948.

SUPPLEMENT

1. The Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. Supp. V, Secs. 851-869, as amended, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Preference Act of 1944."

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments, of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; (5) widowed mothers (if they have not remarried and were widows at the time of the death or disability of their ex-serviceman son or ex-servicewoman daughter)—(A) of deceased ex-servicemen or ex-servicewoman who

lost their lives while on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or (B) of service-connected permanently and totally disabled ex-servicemen or ex-servicewomen, if said ex-serviceman or ex-servicewoman was separated from such armed forces under honorable conditions; and (6) a mother of a deceased ex-serviceman or ex-servicewoman who lost his or her life while on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or of a service-connected permanently and totally disabled ex-serviceman or ex-servicewoman, if (A) said ex-serviceman or ex-servicewoman was separated from such armed forces under honorable conditions, (B) the mother was divorced or legally separated from the father of said ex-serviceman son or ex-servicewoman daughter, and (C) said ex-serviceman son or ex-servicewoman daughter is the only child of said mother".[1]

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), (3), (5) and (6)[2] and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided*, That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

SEC. 4. In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rating where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by

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[1] As amended by the Act of January 19, 1948, P. L. 396, 80th Cong., 2nd Sess.

[2] *Id.*

such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service and organizational activities, regardless of whether any compensation was received therefor.

SEC. 5. In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision.

SEC. 6. Preference eligibles shall not be subject to the provisions of section 9 of the Civil Service Act, concerning two or more members of a family in the service, or to the provisions of section 2 of that Act concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile.

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided,* That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the

top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further*, That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

SEC. 10. The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 2 (1), (2), (3), (5) and (6)[3] of this Act upon application for examination for any such position.

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

[3] As amended by the Act of January 19, 1948, P. L. 396, 80th Cong., 2nd Sess.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service, and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends:[4] *Provided further*, That

[4] As amended by the Act of August 4, 1947, P. L. 325, 80th Cong., 1st Sess.

the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

SEC. 16. Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 7 hereof, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in sections 7 and 8 hereof.

SEC. 17. The term "Civil Service Commission" or "Commission" as used in this Act shall mean the present United States Civil Service Commission or any body or person who may by law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this Act.

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, or of any department of the Government or officer thereof.

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regula-

tions to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof.

SEC. 20. Nothing contained in this Act is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with the advice and consent of the United States Senate: *Provided, however*, That the provisions of this Act shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938.

SEC. 21. If any part of this Act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

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2. Section 8 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, 890, 50 U. S. C. App. Sec. 308, as amended, provides in part:

SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b), shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) * * * of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and ser-

vice in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

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3. Section 6 of the • • • Act of August 24, 1912, • • • 37 Stat. 555, 5 U. S. C. Sec. 652, provides:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service. . . ."

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4. The pertinent sections of the reduction-in-force regulations of the United States Civil Service Commission, issued under Section 12 of the Veterans' Preference Act of 1944, 5 CFR (1945 Supp.) § 12.301 *et seq.*, as amended, 12 F. R. 1291 (Feb. 25, 1947) provide:

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE.

AUTHORITY: §§ 20.1 to 20.14, inclusive, issued under sec. 12, 58 Stat. 390; 5 U. S. C. Sup. 861.

§ 20.1 *Extent of part.* The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. They apply to all civilian employees in the executive branch of the Federal Government, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate, and those who are appointed by the President of the United States.

§ 20.2 *Definitions.* For the purpose of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former

employee with established reemployment or restoration rights, or for other reasons. However, the term does not apply to (1) termination of temporary appointments limited to one year or less, (2) retirement of employees, or (3) separations for unsatisfactory service.

(b) "Retention groups" and "subgroups" means classes of employees entitled to the same degree of retention preference on the basis of tenure of employment and veteran preference.

(c) "Retention credits" are credits for length of service and efficiency ratings in determining retention order in each retention subgroup. They are computed by allowing one point for each full year of Federal Government service plus five points for an "Excellent" efficiency rating, three points for a "Very Good" efficiency rating, and one point for a "Good" efficiency rating. This paragraph shall be effective with respect to notices in reductions in force issued on and after September 15, 1946, or, with respect to individual agencies, at any date prior thereto at the option of the agency: *Provided*, That, with respect to ungraded positions under the Navy Department this paragraph shall be effective on October 15, 1946.

(d) "Federal Government service" means the total of all periods of service eligible for consideration for civil service retirement purposes, without regard to whether the employee is eligible or will be eligible actually to receive retirement benefits. All active military service is counted whether or not veteran preference is given therefor or whether it is eligible to be considered for civil service retirement purposes. Total service shall consist only of full years of creditable service, but fractions of a year shall be considered in arriving at the total.

(e) "Efficiency rating" means (1) for employees paid under the compensation schedules of the Classification Act of 1923 as amended or of Executive Order No. 6746, the current official efficiency rating under the Uniform Efficiency Rating System; and (2) for other employees the current efficiency rating under an efficiency rating system which is in general compliance with the uniform system.

Administratively adopted efficiency rating systems not in general compliance with the uniform system may be used for determining retention credits with the prior approval of the Commission.

(f) "Veteran preference employee" means an employee entitled to veteran preference under the Veterans' Preference Act of 1944.

(g) "Department" means an entire executive department, parent organization with constituent agencies, independent establishment, government-owned or government-controlled corporation of the Federal Government, the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the executive branch of the Federal Government created by Act of Congress or Executive order.

(h) "Governmental entity" means a department, bureau of a department, parent organization, constituent agency, independent establishment, entire field installation, regional office, or field station, an operating department of the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the Federal Government created by Act of Congress or Executive order.

(i) "Competitive area" means a governmental entity, a combination of governmental entities, or that part of a governmental entity for which approval has been secured from the Commission, within which employees of a competitive level are considered to be in competition.

(j) "Competitive level" means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible.

§ 20.3 *Retention preference; classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break

in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A-1 Plus during one-year period after return to duty, as required by law.

A-1 With veteran preference unless efficiency rating is less than "Good".

A-2 Without veteran preference unless efficiency rating is less than "Good".

A-3 With veteran preference where efficiency rating is less than "Good".

A-4 Without veteran preferenee where efficiency rating is less than "Good".

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B-1 With veteran preference unless efficiency rating is less than "Good".

B-2 Without veteran preference unless efficiency rating is less than "Good".

B-3 With veteran preference where efficiency rating is less than "Good".

B-4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

C-1 With veteran preference unless efficiency rating is less than "Good".

C-2 Without veteran preference unless efficiency rating is less than "Good".

C-3 With veteran preference where efficiency rating is less than "Good".

C-4 Without veteran preference where efficiency rating is less than "Good". . . .

§ 20.7 *Compilation of retention register.* Whenever there is to be a reduction in force there shall first be determined the competitive level or levels to be affected. Each employee whose official position is in such a competitive level shall be considered in competition in his retention group in any reduction in force, whether he is in a duty or leave status, pay or nonpay status, or actually engaged in work in another department, another competitive area, or in another competitive level, excluding only those in the active military service of the United States or in the Merchant Marine.

A retention register shall be compiled for each competitive level in which a reduction in force is to be made, showing the names of all employees in competition by retention groups and subgroups. It shall be arranged in sequence showing subgroup A-1 plus with highest retention preference, followed in order by subgroups A-1, A-2, A-3, A-4, B-1, B-2, B-3, B-4, C-1, C-2, C-3, and C-4. Within each subgroup in retention groups A and B where some but not all employees may be affected by the reduction in force, names shall be arranged in sequence according to retention credits, with higher retention preference accorded to those with a greater number of retention credits. No computations of retention credits are necessary for employees in any retention subgroup which will not be affected by the reduction in force, in any subgroup where all of the employees are to be separated, or in retention group C. For this purpose, the employee records shall be reviewed and brought up to date with respect to length of service, efficiency ratings, and other particulars regarding which changes have occurred since the records were last made current.

This register shall be maintained in the order specified for inspection by employees, and shall at all times be available for inspection by representatives of the Commission.

§ 20.8 *Sequence of selection.* Within each competitive level, action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two

or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy. . . .

§ 20.9 *Actions.* Employees who cannot be retained in their positions because of a reduction in force shall be separated, except as provided below. Such actions may be effective at different times within 90-day periods, each 90-day period being considered as a separate reduction-in-force program, and may be made effective without the prior approval of the Commission.

(a) *Exceptions; furloughs.* Where the reduction in force is the result of a temporary condition which is not expected to continue for more than one year, employees reached for action may, in lieu of being separated, be furloughed for a period not to exceed the unexpired portion of the period of appointment and in no case shall it exceed one year: *Provided,* That notice of furlough to employees in subgroups A-1 and A-2 with competitive status shall conform to the one-year notice rule under § 20.10. In the event that vacancies are to be filled in positions in the competitive level and competitive area from which such employees have been furloughed, such employees shall be given the opportunity to return to duty before any original appointments are made to such positions: *Provided, however,* That since no position in the agency may be filled by original appointment of a person, or by the promotion, reassignment, or transfer of a retention group B or C employee if the agency has employees in subgroup A-1 or A-2 with competitive status on leave or furlough due to reduction in force who are available and qualified to fill the position without undue interruption to the activity, such status employees in subgroup A-1 or A-2 shall be considered for such positions. Offer of recall to duty in positions of the competitive level and competitive area from which furloughed shall be made in the order of retention preference of furloughed employees. . . .

§ 20.10 *Notice to employees.* An employee in group A-1 or A-2 with competitive status affected by a reduction in force shall be given an individual notice in writing one year before the action becomes effective. His one-year notice period shall be composed of, whenever possible, at least 30

days in an active duty status; a non-duty status with pay for the duration of his leave, if any; and the balance of the year in a furlough or leave without pay status. Exceptions to this rule are authorized when the employee requests separation in lieu of furlough, or when the agency as a whole is liquidating, in which case the notice period shall terminate as of the day the agency is finally liquidated.

Each employee, except those in subgroups A-1 or A-2 with competitive status, affected by reduction in force shall be given an individual notice in writing at least 30 days before the action becomes effective. Where it is not possible to continue the employee in an active-duty status for the period specified in the notice, he shall have the greatest possible notice before he is relieved from active duty and shall thereafter be carried on the rolls for the remainder of the period. If the period of active duty after the notice is given and the period of accrued leave total less than thirty days, the employee shall be carried in a non-pay status for the remainder of the 30-day period. Notices to employees shall inform them of:

(a) The nature and effective date of the action,

(b) The proper office of the organization where he may examine a copy of these regulations and inspect the retention register and records,

(c) His right to appeal the proposed action to the Commission (departmental employees in the Washington area to the Central Office and others to the appropriate regional or branch office) within ten days from the receipt, and

(d) The procedure for exercising any restoration or reemployment rights he may have, and the channels (departmental and field) through which he may apply for other government employment. . . .